

2

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 38

THE HOOVEN & ALLISON CO., PETITIONER,

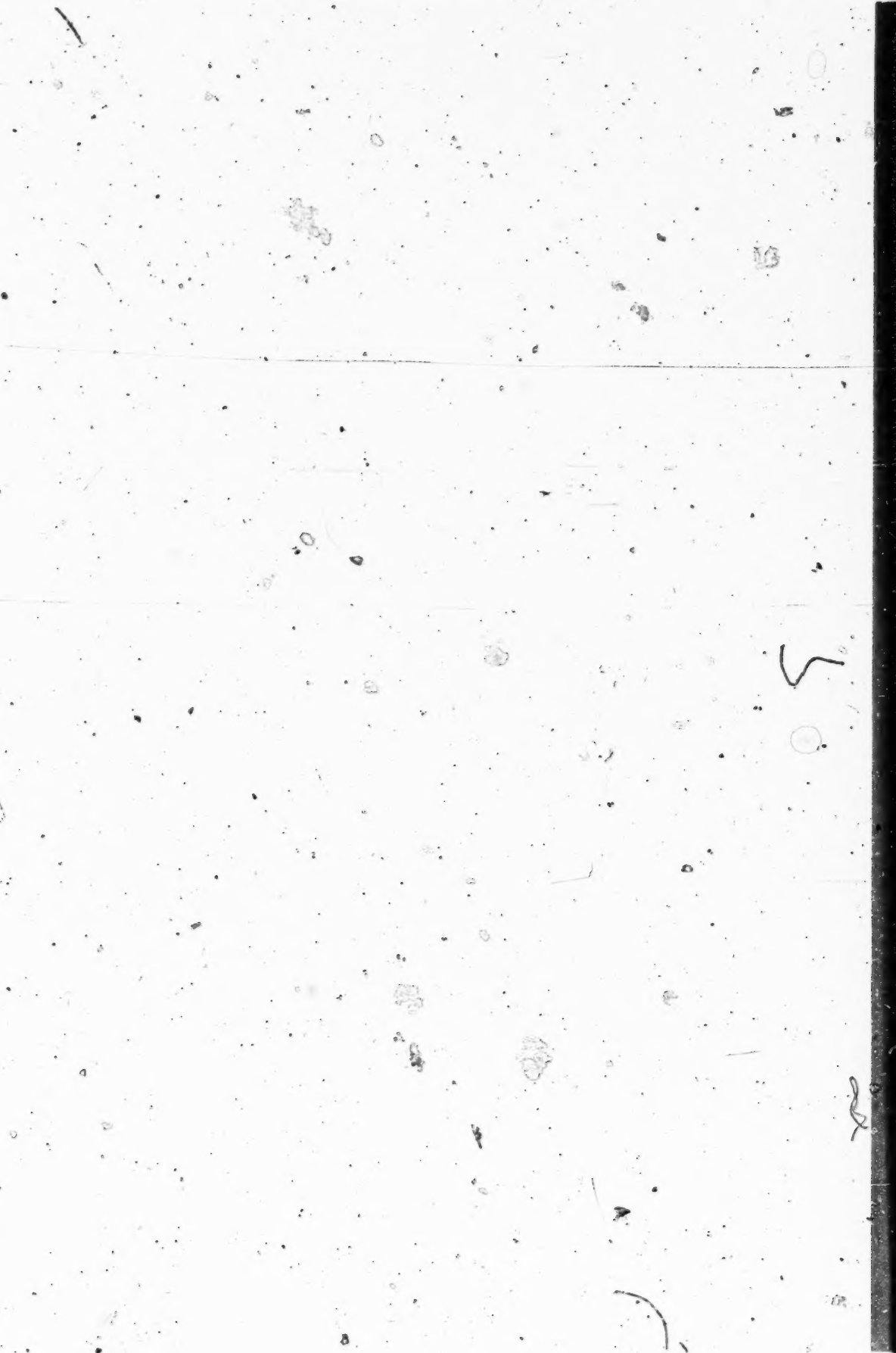
vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE
OF OHIO

PETITION FOR CERTIORARI FILED MARCH 14, 1945

CERTIORARI GRANTED APRIL 10, 1945



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

THE HOOVEN & ALLISON CO., PETITIONER,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1944.

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**BEFORE BOARD OF TAX APPEALS, DEPARTMENT
OF TAXATION**

No. 4441

THE HOOVEN AND ALLISON COMPANY, Xenia, Ohio, Appellant,

v.

WILLIAM S. EVATT, Tax Commissioner, Columbus, Ohio,
Appellee

NOTICE OF APPEAL

The Hooven and Allison Company, above-named appellant, hereby gives notice of appeal from the assessment, reassessment, valuation, determination, finding, computation or order of William S. Evatt, Tax Commissioner, Department of Taxation, State of Ohio, above-named appellee, set forth in his assessment certificates of valuation and distribution dated July 3, 1941, and notice of final determination, dated July 31, 1941; and as the basis of its appeal alleges as follows:

(1) The appellant is a corporation organized and existing under the laws of the state of Ohio, with its principal place of business at Xenia, Ohio;

(2) The assessment certificates of valuation and distribution of the appellee, true copies of which are attached hereto and by reference hereby incorporated herein, were mailed to appellant on July 3, 1941;

(3) The notice of the final determination of the appellee, a true copy of which is attached hereto and by reference hereby incorporated herein, was sent to the appellant on July 31, 1941;

(4) The taxes in controversy are tangible personal property taxes for the calendar years 1938, 1939, and 1940;

[fol. 3], (5) The assessment, reassessment, valuation, determination, finding, computation or order set forth in said assessment certificates of valuation and distribution and notice of final determination, of which complaint is made

and from which appeal is hereby taken, is erroneous, invalid, and unlawful, for the following reason:

The appellee erred in including in the taxable inventory of of appellant for the taxable years 1938, 1939, and 1940, tangible personal property imported by appellant from foreign countries and held by it in the original package during said years, in violation of article I, Section 10, Clause 2, of the Constitution of the United States.

Wherefore, appellant appeals to the Board of Tax Appeals to rehear, review, redetermine, or correct said tax assessments, reassessments, valuations, determinations, findings, computations, or orders of the appellee as set forth in said assessment certificates of valuation and distribution, and notice of final determination, and to issue an order that appellant's returns, as filed, and its taxes, as paid, are complete and proper, and in full satisfaction of all of appellant's tax liability for the years herein involved.

The Hooven and Allison Company, by Thomas C. Lavery, Attorney.

Thomas C. Lavery, P. O. Box 5, Campus Station, Cincinnati, Ohio, Attorney for appellant.

[fol. 4] NOTICE OF FINAL DETERMINATION—Jul. 31, 1941

In the Matter of the Application of THE HOOVEN AND ALLISON COMPANY for Review and Redetermination

The application of The Hooven and Allison Company, Xenia, Ohio, for review and redetermination of amended assessment certificates issued July 3, 1941, came on for consideration.

It appears that certain items of tangible personal property were omitted from the returns of applicant for the years 1938, 1939 and 1940 upon the contention that such property is not subject to taxation by the State of Ohio on the grounds that it is tangible personal property imported by appellant from foreign countries and held by it in the original package during such years. Upon consideration of the applicant's course of business and all circumstances surrounding the acquisition of such property,

it is held that such property is not immune from taxation by the State of Ohio and the amended assessment certificates as issued July 3, 1941, are correct.

The application is therefore denied.

Department of Taxation, William S. Evatt, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation this day taken by the Tax Commissioner with respect to the above matter.

William S. Evatt, Tax Commissioner:

(Here follow 3 photolithographs, side folios 5-7.)

INTER-CITY CORPORATION TANGIBLE PERSONAL PROPERTY
ASSESSMENT CERTIFICATE OF VALUATION AND DISTRIBUTION
 BY
DEPARTMENT OF TAXATION

H-68

Columbus, Ohio,

July 3, 1941

To the Auditor of Greene County, Ohio:

Sir: This is to certify that The Department of Taxation has fixed the value of tangible personal property
 of The Hooven & Allison Company Company

Address Xenia, Ohio

for taxation for the year 1938, and has apportioned to your county the sum of \$ 659,520
 distributed between the taxing districts therein as stated below. Upon receipt of this Certificate, you are re-
 quired to place these valuations on the general tax list and duplicate and taxes shall be levied and collected
 thereon in the same manner and at the same rate as real property in the taxing district.

TAXING DISTRICT

ASSESSED
VALUE NOT
INCLUDING
PENALTYPENALTY
ASSESSMENTSTOTAL
AMOUNT
ASSESSED

REMARKS

Xenia

659,520

Corrected per W.W.Earhart report - Imported goods added back
 Superseding assessment of Aug. 8, 1938 - Company waived rights under
 Sec. 5377 General Code of Ohio

**INTER-COUNTY CORPORATION TANGIBLE PERSONAL PROPERTY
ASSESSMENT CERTIFICATE OF VALUATION AND DISTRIBUTION
BY
DEPARTMENT OF TAXATION**

H-60

Columbus, Ohio.

July 3, 1941

To the Auditor of Greene County, Ohio:

Sir: This is to certify that The Department of Taxation has fixed the value of tangible personal property of The Mooven & Allison Co. Company

Address Xenia, Ohio

for taxation for the year 1939, and has apportioned to your county the sum of \$ \$604,190 distributed between the taxing districts therein as stated below. Upon receipt of this Certificate, you are required to place these valuations on the general tax list and duplicate and taxes shall be levied and collected thereon in the same manner and at the same rate as real property in the taxing district.

TAXING DISTRICT	ASSESSED VALUE NOT INCLUDING PENALTY	PENALTY ASSESSMENTS	TOTAL AMOUNT ASSESSED	REMARKS
Xenia City	\$604,190			

Corrected per W.W. Earhart report - imported goods added back

Superseding assessment of Aug. 14, 1939

INTER-COUNTY CORPORATION TANGIBLE PERSONAL PROPERTY
ASSESSMENT CERTIFICATE OF VALUATION AND DISTRIBUTION
 BY
 DEPARTMENT OF TAXATION

E-44

Columbus, Ohio, July 3, 1941

To the Auditor of Greene County, Ohio:

Sir: This is to certify that The Department of Taxation has fixed the value of tangible personal property
 of The **Hooven & Allison Company** Company

Address **Xenia, Ohio**

for taxation for the year 1940, and has apportioned to your county the sum of \$ **430,080**
 distributed between the taxing districts therein as stated below. Upon receipt of this Certificate, you are re-
 quired to place these valuations on the general tax list and duplicate and taxes shall be levied and collected
 thereon in the same manner and at the same rate as real property in the taxing district.

TAXING DISTRICT	ASSESSED VALUE NOT INCLUDING PENALTY	PENALTY ASSESSMENTS	TOTAL AMOUNT ASSESSED	REMARKS
Xenia City	430,080			

Corrected per W.W. Farhart report - imported goods added back

Superseding assessment of Aug. 12, 1940

[fol. 8]

BEFORE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION

No. 4441

THE HOOVEN AND ALLISON COMPANY, Xenia, Ohio, Appellant,

WILLIAM S. EVATT, Tax Commissioner, Columbus, Ohio,
Appellee

ACKNOWLEDGMENT OF RECEIPT OF NOTICE

Receipt of the notice of appeal of the Hooven and Allison Company, Xenia, Ohio, from the assessment, reassessment, valuation, determination, finding, computation or order of William S. Evatt, Tax Commissioner, Department of Taxation, State of Ohio, as evidenced by his assessment certificates of valuation and distribution dated July 3, 1941, covering the calendar years 1938, 1939, and 1940, is hereby acknowledged this 31st day of July, 1941.

William S. Evatt, Tax Commissioner, Board of Tax Appeals, by Hugh S. Jenkins, Chairman,

[fol. 9] TRANSCRIPT OF 1938 INTER-COUNTY RETURN HOOVEN & ALLISON Co.—Filed Sept. 17, 1942. Board of Tax Appeals, Department of Taxation of Ohio, Columbus, Ohio.

[fol. 10] TIME LIMITATION WAIVER AGREEMENT (Copy)

(Section 5377 General Code of Ohio)

1938 Ohio Personal Property Tax Return

I/We, the undersigned, hereby waive the time limitations applicable to the above return as set forth in Section 5377 of the General Code of Ohio and consent that such time limitation shall be extended to August 9, 1943.

Date Executed Aug. 6, 1940. Name Hooven & Allison Co.

Approved by Dept. of Taxation of Ohio, by Clark, by Auditor.

INTER-COUNTY AND/OR CONSOLIDATED CORPORATION RETURN OF TAXABLE PROPERTY FOR 1938 1941

This RETURN together with the required BALANCE SHEET, must be filed after February 15 and on or before March 31, 1941.

An Inter-County Return (Whether Consolidated or not) must be filed with the Department of Taxation, Intangible Tax Division, State Office Building, Columbus, Ohio.

All Taxable Property MUST be listed as of January 1, 1941, or authorized or required fiscal year end.

ALL TAXABLE PROPERTY MUST be listed as of January 1, 1941, or authorized subsequent date.

RETURNS ARE STRICTLY CONFIDENTIAL AND SEVERE PENALTY IS PROVIDED FOR ANY PUBLIC EMPLOYEE DIVULGING INFORMATION. (Secs. 12924-7 and 12924-8 G. C.)

(PRINT PLAINLY NAMES AND ADDRESSES)

Name of Corporation The Hoover and Allison Company Organized under the Laws of the State of Ohio

Address Principal Accounting Office Xenia, Ohio Location of Prin. Place of Business in Ohio Xenia, Ohio

Date of Organization June 13, 1888 If Foreign Corporation, date of admittance to do business in Ohio _____

CORPORATIONS MAKING CONSOLIDATED RETURN, FILL OUT THE FOLLOWING.

CORPORATIONS MAKING CONSOLIDATED RETURN, FILL OUT THE FOLLOWING.
 This return is made by the above named Corporation as holder of fifty-one percent or more of the common stock of the following named Corporations. See Department of Taxation Rule No. 283 on back of this schedule.

[illegible]

CORPORATIONS, MAKING AN INTER-COUNTY RETURN, FILL OUT THE FOLLOWING.

CORPORATIONS, MAKING AN INTER-COUNTY RETURN, FILL OUT THE FOLLOWING:
 This Corporation (and/or one or more of its subsidiaries) is engaged in business in the following Counties in Ohio, as indicated below:

[illegible]

Date of Organization.....June 13, 1888

date of admittance to do business in Ohio

CORPORATIONS MAKING CONSOLIDATED RETURN, FILL OUT THE FOLLOWING.

This return is made by the above named Corporation as holder of fifty-one percent or more of the common stock of the following named Corporations. See Department of Taxation Rule No. 283 on back of this schedule.

Name	Organized Under Laws of What State	Principal Place of Business Designated in Ohio (if foreign) or Section in Articles (if domestic)	Total Number of Shares of Outstanding Common Stock	Number Owned by Reporting Company

CORPORATIONS MAKING AN INTER-COUNTY RETURN, FILL OUT THE FOLLOWING.

This Corporation (and/or one or more of its subsidiaries) is engaged in business in the following Counties in Ohio, as indicated below:

County	Kind of Business	NAME ("TRADE" OR OTHERWISE) UNDER WHICH BUSINESS CONDUCTED IN EACH LOCATION
Greene	Manufacturer of Rope, Binder Twine and Cordage	
Hamilton	Storage of manufactured Goods.	

THE FOLLOWING QUESTIONS, SO FAR AS APPLICABLE, MUST BE ANSWERED IN FULL—AND TO THE EXTENT INDICATED ARE IN LIEU OF QUESTIONS STATED ON THE SEPARATE RETURN FORMS FILED HEREWITH; IF NOT SO ANSWERED, THIS RETURN WILL NOT BE ACCEPTED AND THE PENALTY FOR FAILURE TO FILE RETURN WILL BE ASSESSED.

- I. If address of Corporation's principal place of business in Ohio was on January 1, 1941, other than that noted above, give here the address as of January 1, 1941: _____
- II. Check listing day as of which the corporation's taxable property will hereinafter be listed:
- (A) ☒ January 1.
- (B) ☐ Fiscal Year and required pursuant to Rule No. 202. (See back of this form for Rule No. 202.)
- (C) ☐ Fiscal Year and otherwise authorized by Department of Taxation Permit No. _____ (See Rule No. 202.)
- III. IF THIS IS NOT A CONSOLIDATED RETURN—ANSWER HERE—(IF A CONSOLIDATED RETURN, this question is to be answered for each corporation on one of the 945-B-2 Forms).
- (A) Was the Corporation engaged in business on January 1, 1941? _____ YES ☒ No ☐
- (B) If NOT, has it commenced business since January 1, 1941, and before filing this Return? _____ YES ☐ No ☐
- IV. If this is a consolidated return—on what date was permission granted to file (See Department of Taxation Rule No. 202) _____ 194_____

CORPORATION RETURN FORM No. 945-B-2

One Completed Form Necessary for Each Corporation Reporting in This Return.

(PRINT PLAINLY NAMES AND ADDRESSES)

Name of Corporation The Hoover and Allison Company Organized under the Laws of the State of Ohio
 Address Principal Accounting Office Xenia, Ohio Location of Prin. Place of Business stated in Articles of Incorporation Xenia, Ohio
 Address or other location of Actual Place of Business Xenia, Ohio Date of Organization June 13, 1898
 Address of Ohio Statutory Agent _____ If Foreign Corporation, state address _____

Kind or Kinds of Business in which engaged Manufacturer of Rope, Binder Twine and Cordage

If name of Corporation has been changed during the preceding year, give former name.

THE FOLLOWING QUESTIONS SO FAR AS APPLICABLE MUST BE ANSWERED IN FULL; IF NOT SO ANSWERED, THIS RETURN WILL NOT BE ACCEPTED AND THE PENALTY FOR FAILURE TO FILE RETURN WILL BE ASSESSED

III. (A) Was the corporation engaged in business on January 1, 1941? YES ☒ NO ☐
(B) If not, has it commenced business since January 1, 1941, and before filing this return? YES ☐ NO ☐

IV. What tangible personal property not owned by the Corporation and not shown on its balance sheet did it hold as LESSOR, on CONSIGNMENT, under CONDITIONAL SALES CONTRACT or under SIMILAR AGREEMENT, on the day as of which the Corporation has listed its own property?

In the event the taxpayer filing this report is required to pay the tax on any of this property, please list same on schedule I-C to S-C as case may require.

(A) PROPERTY HELD IN OHIO

[illegible]

(A) Give here information concerning all new buildings or improvements made or erected since April 14, 1940, on any real estate in this country owned or occupied by you; also estimated increase in value of lands so held, due to development of oil, gas, coal, stone, clay, gravel and other mineral works.

None
(Kind of Improvement or Mineral Development)

(On what lot or lands situated)

(Approximate Increase in Value)

(B) Give here information concerning buildings, structures, timber, and other trees so held, wholly or partially destroyed since October 1, 1940 and not restored or to be restored prior to April 13, 1941; also estimated decrease in value of lands so held, due to exhaustion or abandonment of mineral deposits within the past year.

Note
(Kind of Improvement or Mineral Development)

(On what lot or lands situated)

(Approximate Decrease in Value)

VI. Was the Corporation on January 1, 1941, acting, or has it, since that date and before filing this return, commenced to act in the transaction of business for a non-resident of the state of Ohio, or for a foreign corporation not admitted to do business in Ohio, as agent, factor, broker or otherwise? YES ☒ NO ☐

If so, check capacity in which the Corporation acted and give name, address and nature of business as to each principal.

Capacity	Name of Principal	Address	Nature of Business

Form No. 945-C-6

334,301 - Imports

RECAPITULATION OF LISTED VALUES OF TANGIBLE PERSONAL PROPERTY

County	Taxing District Townships, Special School Districts, Cities and Incorporated Villages	Domestic Animals & Agricultural Products (From Form No. 945 C-1)	Watercraft, Aircraft & Electrical Equipment (From Form No. 945 C-2)	Engines, Machinery, Tools & Implements (From Form No. 945 C-3)	Manufactur- ing Inventories (From Form No. 945 C-6)	Merchandise Inventories (From Form No. 945 C-7)	Other Per- sonal Property Used in Business (From Form No. 945 C-8)	Taxing District Listed Value Totals	County Listed Value Totals (extend taxing district totals for each County)	Penalty
renew	Xenia City			112190	206 882		2 627		425 730	
amilton	Cincinnati					2000			2000	
2-41	Correction Xenia City			112 190	545 630 309 760 233 770		3 700 Former Increase		659 520 425 750 233 770	
					17 ⁰⁰ 3974	09 ⁰⁰				

Form No. 945-D

Recapitulation of Classified or Intangible Personal Property

Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Productive Investments.....	None	1%	
Item 2 (From Schedule 7) Unproductive Investments.....	None	2 mills	
Item 3 (From Schedule 8) Deposits	25 280 08	2 mills	50 56
Item 4 (From Schedule 9) Credits	None	3 mills	
Item 5 (From Schedule 10) Money and Other Taxable Intangibles.....	200 00	3 mills	60
Total Amount—Aggregate Listed Value and Classified Tax (Add above Classified amounts).....	25 480 08	. . .	51 16

OATH

(Corporate seal should be impressed
so as to effect the legible reading
of any written words or figures.)

STATE OF OHIO, CARROLL COUNTY, ss.:

We do solemnly swear that we are the President and the Treasurer of the above named Corporation and do further swear that the answers which we have given to the specific questions asked in the foregoing tax return, so far as within our knowledge, are true; that the list contains a full disclosure of all property required by law to be listed for taxation on behalf of said Corporation; that the amounts which we have set down therein in our itemization of taxable property are, so far as they represent facts within our knowledge, true and correct; and that, in all cases in which we have answered any such question, or given any such amount, otherwise than from our own positive knowledge, such answer or amount represents our opinion and judgment, based upon the best information available to us.

SWORN to and subscribed before me this 5th day (Sign here) Charles L. Darlington
of April, 1941. Title President
Louis F. Clark (Sign here) E. D. Martin
Deputy Auditor—Notary—Deputy Assessor. Title Treasurer

Was this Return prepared by persons within your own organization? Yes If answer is "NO," show in space below the name and address of person or firm who prepared the return:

Name _____ Address _____

Tax Form No. 945-1
Prescribed by The Department of Taxation
William S. Ewert, Tax Commissioner
For all Corporations using Form No. 945.

Balance Sheet for Inter-County and/or Consolidated Corporations

Indicate whether this year
corresponds with that on
Federal Income Tax Return.
☒ Yes. ☐ No.

FOR (Name) The Heaven and Allison Company

(Address) Xenia, Ohio

Year Ended December 31, 1937

Balance Sheet Item No.	ITEMS ASSETS	OHIO ANALYSIS COLUMNS END of Year						BEGINNING of Year TOTALS	FEDERAL COLUMNS As Reported for Federal Income Tax END of Taxable Year				
		AMOUNT			TOTAL	AMOUNT	TOTAL						
		WITHIN OHIO	WITHOUT OHIO										
CASH—													
1	On deposit in Ohio banks and/or Building and Loan Associations, taxed at source	29	501	65				55	522	22	55	522	
2	On deposit elsewhere within Ohio [Sch. 8]												
3	Unwithdrawable deposits in Ohio financial institutions closed November 12, 1940 (A. State Bank (Taxed at Source Nov. 12, 1940) B. National Bank (Sch. 10)	200											
4	On hand or otherwise not taxed at source [Sch. 10]												
5	ON DEPOSIT OUTSIDE OF OHIO: Yielding annual income exceeding 4% of principal sum withdrawable [Sch. 6 (C)]												
6	Not yielding such an income				24	317	07						
7	Deposits for entire business of owner [Sch. 8 for Ohio Corp.]												
8	Other deposits, withdrawable in course of business by office without Ohio				1	402	35	55	522	05			
9	NOTES RECEIVABLE												
10	Less Book reserves for bad debts												
11	Due within one year from date of inception [Sch. 9, A-1, A-3]				3	465	21				3	465	
12	Due after one year from date of inception: a. Interest bearing (whether productive [Sch. 6 (C)] or unproductive [Sch. 7 (B)] b. Non-interest bearing [Sch. 10]							3	465	21			
13	ACCOUNTS RECEIVABLE												
14	Less Book reserves for bad debts												
15	Due within one year from date of inception [Sch. 9, A-1, A-3]	29	426	49	20	035	53				49	532	
16	Due after one year from date of inception: a. Interest bearing (whether Productive [Sch. 6 (C)] or unproductive [Sch. 7 (B)] b. Non-interest bearing [Sch. 10]												
INVENTORIES—													
17	In manufacture: Raw materials	360	178	48	250	22				361	028	37	
18	Work in process (including burden)	55	262	25						55	262	25	
19	Supplies for manufacture	44	275	60						44	275	60	
20	Finished goods stored in Ohio county of manufacture	355	764	27						355	764	27	
21	Finished goods not so stored and not included below	2	170	20	324	475	51			326	644	41	
22	Consigned to others (Describe fully—see reference 4)												
23	Goods stored in public warehouse												
24	Supplies not for manufacture and not included below												
25	In agriculture: Products on farms												
26	In merchandising, mining, and other business: Goods held for sale												
27	Supplies and/or other inventoried goods												
28	Materials and supplies used in generation or distribution of electricity for others												
29	Grain not subject to property tax												
30	Other (Federal or Ohio)							1 441	683	03	1 545	128	94
											1 441	683	

INVESTMENTS—Non-Taxable

31 Stocks of Corporations other than listing corporation

[illegible]

		AMOUNT	
76	TOTAL ASSETS	1 781 749 62	2 236 974 35
LIABILITIES		AMOUNT	
100	NOTES PAYABLE due within one year from date of inception [Sch. 9, B-1]	100 000 00	100 000 00
101	NOTES PAYABLE due after one year from date of inception		
102	ACCOUNTS PAYABLE due within one year from date of inception [Sch. 9, B-1]	28 652 26	28 652 26
103	ACCOUNTS PAYABLE due after one year from date of inception		
104	BONDS AND NOTES (not secured by mortgage) (enter in Line B-1, Sch. 9, 945-F2, only that portion due within one year from date of inception)		
105	MORTGAGES, (including bonds and notes so secured) (enter in Line B-1, Sch. 9, 945-F2, only that portion due within one year from date of inception)		
106	ACCRUED EXPENSES (a): Interest, [Sch. 9, B-1]		
107	Taxes (and assessments) [Not to be included in Sch. 9, B-1]	47 373 84	47 373 84
108	All other, [Sch. 9, B-1] (Enter in Detail in Form 945N)	9 111 87	9 111 87
109	OTHER LIABILITIES: (Describe fully)		
110		2 834 08	2 834 08
111			
112		2 834 08	2 834 08
113	CAPITAL STOCK: Preferred (less stock in treasury)	520 900 00	520 900 00
114	Common (less stock in treasury)	568 000 00	568 000 00
115	SURPLUS	9 601 02 30	9 601 02 30
116	UNDIVIDED PROFITS		
117	TOTAL LIABILITIES AND CAPITAL	2 236 974 35	2 236 974 35

REFERENCES

[fol. 18] TRANSCRIPT OF 1939 INTER-COUNTY RETURN HOOVEN
& ALLISON Co.—Filed Sept. 17, 1942. Board of Tax Ap-
peals, Department of Taxation of Ohio, Columbus, Ohio

INTER-COUNTY AND/OR CONSOLIDATED
CORPORATION RETURN OF TAXABLE PROPERTY FOR 1932

*This RETURN together with the required BALANCE SHEET must be filed after February 15 and on or before March 31, 1941.

An Inter-County Return (Whether Consolidated or not) must be filed with the Department of Taxation, Intangible Tax Division, State Office Building, Columbus, Ohio.

All Taxable Property MUST be listed as of January 1, 1941, or authorized or required fiscal year end.

RETURNS ARE STRICTLY CONFIDENTIAL and SEVERE PENALTY IS PROVIDED FOR ANY PUBLIC EMPLOYEE DIVULGING INFORMATION. (Secs. 12924-7 and 12924-8 G. C.)

(PRINT PLAINLY NAMES AND ADDRESSES)

Name of Corporation The Hooven and Allison Company Organized under the Laws of the State of Ohio

Address Principal Accounting Office Xenia, Ohio Location of Prin. Place of Business in Ohio Xenia, Ohio

Date of Organization June 15, 1988 If Foreign Corporation, date of admittance to do business in Ohio

CORPORATIONS MAKING CONSOLIDATED RETURN, FILL OUT THE FOLLOWING.

This return is made by the above named Corporation as holder of fifty-one percent or more of the common stock of the following named Corporations. See Department of Taxation Rule No. 203 on back of this schedule.

[illegible]

CORPORATIONS MAKING AN INTER-COUNTY RETURN, FILL OUT THE FOLLOWING.

This Corporation (and/or one or more of its subsidiaries) is engaged in Business in the following Countries in Ohio, as indicated below:

County	Kind of Business	NAME (TRADE OR OTHERWISE) UNDER WHICH BUSINESS CONDUCTED IN EACH LOCATION
Greene	Manufacture of Rope, Binder Twine and Cordage	
Hamilton	Storage of manufactured goods	
Cuyahoga	Storage of manufactured goods	

If Foreign Corporation,
date of admittance to do business in Ohio

CORPORATIONS MAKING CONSOLIDATED RETURN, FILL OUT THE FOLLOWING.
 This return is made by the above named Corporation as holder of fifty-one percent or more of the common stock of the following named Corporations. See Department of Taxation Rule No. 203 on back of this schedule.

This return is made by the above named Corporation as holder of fifty-one percent or more of the common stock of the following named Corporations. See Department of Taxation Rule No. 203 on back of this schedule.

CORPORATIONS MAKING AN INTER-COUNTY RETURN, FILL OUT THE FOLLOWING.
This Corporation (and/or

This Corporation (and/or one or more of its subsidiaries) is engaged in business in the following Counties in Ohio, as indicated below.

THE FOLLOWING QUESTIONS, SO FAR AS APPLICABLE, MUST BE ANSWERED IN FULL—AND TO THE EXTENT INDICATED ARE IN LIEU OF QUESTIONS STATED ON THE SEPARATE RETURN FORMS FILED HEREWITH. IF NOT SO ANSWERED, THIS RETURN WILL NOT BE ACCEPTED AND THE PENALTY FOR FAILURE TO FILE RETURN WILL BE ASSESSED.

7V. If this is a consolidated return—on what date was permission granted to file
(See Department of Taxation Rule No. 201).

CORPORATION RETURN FORM No. 945-B-2

One Completed Form Necessary for Each Corporation Reporting in This Return.

(PRINT PLAINLY NAMES AND ADDRESSES)

Name of Corporation **The Heavren and Allison Company**
 Address Principal Accounting Office **Xenia, Ohio**
 Address or other location of Actual Place of Business **Xenia, Ohio**
 Address of Ohio Statutory Agent _____
 Organized under the Laws of the State of **Ohio**
 Location of Prim. Place of Business stated in Articles of Incorporation **Xenia**
 Date of Organization **June 13, 1903**
 If Foreign Corporation, date admitted to do business in Ohio _____

Kind or Kinds of Business in
which engaged Manufacture of Rope, Binder Twine and Cordage

If name of Corporation has been changed during the preceding year, give former name _____

THE FOLLOWING QUESTIONS SO FAR AS APPLICABLE MUST BE ANSWERED IN FULL; IF NOT SO ANSWERED, THIS RETURN WILL NOT BE ACCEPTED AND THE PENALTY FOR FAILURE TO FILE RETURN WILL BE ASSESSED

III. (A) Was the corporation engaged in business on January 1, 1941? YES ☒ NO ☐
(B) If not, has it commenced business since January 1, 1941, and before filing this return? YES ☐ NO ☐

IV. What tangible personal property not owned by the Corporation and not shown on its balance sheet did it hold as LESSEE, on CONSIGNMENT, under CONDITIONAL SALES, CONTRACT or under SIMILAR AGREEMENT, on the day as of which the Corporation has listed its own property?

In the event the taxpayer filing this report is required to pay the tax on any of this property, please list same on schedules 1-C to 8-C as one may require.

(A) PROPERTY HELD IN OHIO—

[illegible]

V. (A) Give here information concerning all new buildings or improvements made or erected since April 14, 1940, on any real estate in this county owned or occupied by you; also estimated increase in value of lands so held, due to development of oil, gas, coal, stone, clay, gravel and other mineral works.

Name (Kind of Improvement or Mineral Development)	On what lot or lands situated	Approximate Increase in Value

(B) Give here information concerning buildings, structures, timber, and other trees so held, wholly or partially destroyed since October 1, 1948 and not restored or to be restored prior to April 13, 1949; also estimated decrease in value of lands so held, due to exhaustion or abandonment of mineral deposits within the past year.

Improvement or Mineral Development)	(On what lot or lands situated)	(Approximate Decrease in Value)

VI. Was the Corporation on January 1, 1941, acting, or has it, since that date and before filing this return, commenced to act in the transaction of business for a non-resident of the state of Ohio, or for a foreign corporation not admitted to do business in Ohio, as agent, factor, broker or otherwise? YES ☒ NO ☐

If so, check capacity in which the Corporation acted and give name, address and nature of business as to each principal.

Capacity	Name of Principal	Address	Nature of Business

THE FOLLOWING QUESTIONS SO FAR AS APPLICABLE MUST BE ANSWERED IN FULL; IF NOT SO ANSWERED, THIS RETURN WILL NOT BE ACCEPTED AND THE PENALTY FOR FAILURE TO FILE RETURN WILL BE ASSESSED.

- IV. What tangible personal property not owned by the Corporation and not shown on its balance sheet did it hold as LESSEE, on CONSIGNMENT, under CONDITIONAL SALES CONTRACT or under SIMILAR AGREEMENT, on the day as of which the Corporation has listed its own property?

In the event the taxpayer filing this report is required to pay the tax on any of this property, please list same on schedules I-C to E-C as case may require.

[illegible]

- V. (A) Give here information concerning all new buildings or improvements made or erected since April 14, 1940, on any real estate in this county owned or controlled by you; also estimated increase in value of lands so held, due to development of oil, gas, coal, stone, clay, gravel and other mineral works.

None		8
(Kind of Improvement or Mineral Development)	(On what lot or lands situated)	(Approximate Increase in Value)

- (B) Give here information concerning buildings, structures, timber, and other trees so held, wholly or partially destroyed since October 1, 1940 and not restored or to be restored prior to April 13, 1941, also estimated decrease in value of lands so held, due to exhaustion or abandonment of mineral deposits within the past year.

Value	Improvement or Mineral Development	(On what lot or lands situated)	(Approximate Decrease in Value)

- VI. Was the Corporation on January 1, 1941, acting, or has it, since that date and before filing this return, commenced to act in the transaction of business for a non-resident of the state of Ohio, or for a foreign corporation not admitted to do business in Ohio, as agent, factor, broker or otherwise? YES ☒ NO ☒
- If so, check capacity in which the Corporation acted and give name, address and nature of business as to each principal.

VII. As shown by the records of the corporation as of the beginning of business January 1, 1941, did any shareholder of any class of stock reside in Ohio? YES ☒ NO ☐ If the answer is "YES", furnish the following information:

Description of Class	Par Value Each Share (if any)	Aggregate Dividend Rate or Amount per share for calendar Year 1940	Description of Class	Par Value Each Share (if any)	Aggregate Dividend Rate or Amount per share for calendar Year 1940
Common	\$100.00	1.00			
Preferred	100.00	.50			

REPORTS AS TO OTHER OWNERS AND CORPORATE SECURITY RECORD:
We have filled out 243 (number of) Co. Aud. Tax Form No. 939, which constitute a complete report of shares of stock of this corporation held by Ohio residents (corporations omitted); also, Co. Aud. Tax Form No. 918, corporation security record, both as of the beginning of business January 1, 1941. Form 939 was transmitted to the Department of Taxation (date) January 28, 1942. Form 938 (date) January 28, 1942.

NOTE: Both of these forms constitute an essential part of the corporation's tax return; and if not completely filled out and duly forwarded, the return cannot be deemed completely filed and, therefore, is subject to a penalty in addition to the tax.

LISTED VALUES	
Not actually used in or held for production	Used in or held for production
(1) Agriculture	(1) Agriculture
(2) Baking & Milling	(2) Baking & Milling
(3) Mining	(3) Mining
(4) Lumbering & Dry Cleaning	(4) Lumbering & Dry Cleaning
(5) Tanning & Leather Supply	(5) Tanning & Leather Supply
(6) Stone Plants	(6) Stone Plants
(7) Gravel Plants	(7) Gravel Plants
70% of Dep. Book Value	50% of Dep. Book Value

[illegible]

Form No. 945-C3

List separately property used in each Taxing District. To list as per book accounts, see Form No. 945 A-1, Part 2.

**Listed
Value 50%
of Average
Value**

•

[illegible]

Form No. 945-C-6

INSTRUCTIONS—Use of Form 945 C-7.

MERCHANDISING OR SIMILAR INVENTORIES LISTING FORM.

This Form is to be used by Merchants in listing their average monthly Inventory Values. To fill out this schedule, insert the county name in the column at the left side of the sheet and then to the right of this the various Taxing Districts in which Tangible personal property of this type is located. Opposite each Taxing District named, enter in the columns provided the information as required by the Form, totaling such values in the column headed "Total Monthly Inventory Values". In the next column show the Average Monthly Inventory Values and then extend for listing purposes to the 70% column such values for each Taxing District. The totals as arrived at the listed value column must be carried forward to the recapitulation Form 945 D.

List values in dollars only and make all items end in 0, viz., 100--110--120.

Segregate inventories of consigned goods and give name and address of consignor.

RECAPITULATION OF LISTED VALUES OF TANGIBLE PERSONAL PROPERTY

County	Taxing District Townships, Special School Districts, Cities and Incorporated Villages	Domestic Animals & Agricultural Products (From Form No. 945 C-1)	Watercraft, Aircraft & Electrical Equipment (From Form No. 945 C-2)	Engines, Machinery, Tools & Implements (From Form No. 945 C-3)	Manufactur- ing Inventories (From Form No. 945 C-6)	Merchandis- ing Inventories (From Form No. 945 C-7)	Other, Per- sonal Property Used in Business (From Form No. 945 C-8)	Taxing District Listed Value Totals	County Listed Value Totals (extend taxing district totals for each County)
Greene	Ionia City			103274	350094		3460		468780
Hamilton	Cincinnati					1980			1980
Cuyahoga	Cleveland					110			110
1/2 1/41	Correction Ionia City	Imports added to previous report						604130	468780
				103274	477400		3460		

Recapitulation of Classified or Intangible Personal Property Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Productive Investments.....	None	5%	
Item 2 (From Schedule 7) Unproductive Investments.....	None	2 mills	
Item 3 (From Schedule 8) Deposits.....	102 182 60	2 mills	204 37
Item 4 (From Schedule 9) Credits.....	46 447 80	3 mills	139 32
Item 5 (From Schedule 10) Money and Other Taxable Intangibles.....	200 00	3 mills	60
Total Amount—Aggregate Listed Value and Classified Tax (Add above Classified amounts).....	148 833 90		544 30

OATH

(Corporate seal should be impressed so as not to affect the legible reading of any written words or figures.)

STATE OF OHIO, GREENE COUNTY, ss.:

We do solemnly affirm that we are the President and the Treasurer of the above named Corporation and do further swear that the answers which we have given to the specific questions asked in the foregoing tax return, so far as within our knowledge, are true; that the list contains a full disclosure of all property required by law to be listed for taxation on behalf of said Corporation; that the amounts which we have set down therein in our itemization of taxable property are, so far as they represent facts within our knowledge, true and correct; and that, in all cases in which we have answered any such question, or given any such amount, otherwise than from our own positive knowledge, such answer or amount represents our opinion and judgment, based upon the best information available to us.

SWORN to and subscribed before me this 27th day (Sign here) Charles L. Darlington
of April 1941. Title President
Clara J. Marshall Deputy Assessor. (Sign here) H. E. Martin
Title Treasurer

Was this Return prepared by persons within your own organization? Yes If answer is "NO," show in space below the name and address of person or firm who prepared the return:

Name _____ Address _____

Balance Sheet for Inter-County and/or Consolidated Corporations

Indicate whether this year end
corresponds with that on your
Federal Income Tax Return.
☐ Yes. ☐ No.

FOR (Name) The Heaven and Allison Company (Address) Xenia, Ohio Year Ended December 31 1938, 1938.

Balance Sheet Item No.	ITEMS ASSETS	OHIO ANALYSIS COLUMNS END of Year			BEGINNING of Year TOTALS	FEDERAL COLUMNS As Reported for Federal Income Tax END of Taxable Year	
		AMOUNT		TOTAL		AMOUNT	TOTAL
		WITHIN OHIO	WITHOUT OHIO				
1	CASH—						
2	On deposit in Ohio banks and/or Building and Loan Associations, taxed at source	59 091 68			55 921 08		151 299 21
3	On deposit elsewhere within Ohio [Sch. 8]						
4	Unwithdrawable deposits in [A. State Bank (Taxed at Source, Nov. 12, 1940) Ohio financial institutions closed November 12, 1940 [B. National Bank (Sch. 10)]	300 00					
5	On hand or otherwise not taxed at source [Sch. 10]						
6	ON DEPOSIT OUTSIDE OF OHIO: Yielding annual income exceeding 4% of principal sum withdrawable [Sch. 5 (C)]		90 221 99				
7	Not yielding such an income						
8	Deposits for entire business of owner [Sch. 8 for Ohio Corp.]		1 785 54	151 299 21			
9	Other deposits, withdrawable in course of business by office without Ohio						
10	NOTES RECEIVABLE				2 465 21		2 207 69
11	Less Book reserves for bad debts						
12	Due within one year from date of inception [Sch. 9, A-1, A-3]		2 207 69				
13	Due after one year from date of inception: a. Interest bearing (whether productive [Sch. 6 (C)] or unproductive [Sch. 7 (B)] b. Non-interest bearing [Sch. 10]			2 207 69			
14	ACCOUNTS RECEIVABLE				49 532 02		77 426 84
15	Less Book reserves for bad debts						
16	Due within one year from date of inception [Sch. 9, A-1, A-3]	44 975 88	32 450 96				
17	Due after one year from date of inception: a. Interest bearing (whether Productive [Sch. 6 (C)] or unproductive [Sch. 7 (B)] b. Non-interest bearing [Sch. 10]			77 426 84			
18	INVENTORIES—						
19	In manufacture: Raw materials	331 927 54				331 927 54	
20	Work in process (including burden)	46 236 23				46 236 23	
21	Supplies for manufacture	35 559 37				35 559 37	
22	Finished goods stored in Ohio county of manufacture	355 573 18				355 573 18	
23	Finished goods not so stored and not included below	2 329 28	256 249 45			258 648 73	
24	Consigned to others (Describe fully—see reference 4)						
25	Goods stored in public warehouses						
26	Supplies not for manufacture and not included below						
27	In agriculture: Products on farms						
28	In merchandising, mining, and other business: Goods held for sale						
29	Supplies and/or other inventoried goods						
30	Materials and supplies used in generation or distribution of electricity for others						
31	Grain not subject to property tax						
32	Other (Federal or Ohio)			1 028 015 02	1 441 683 03		1 028 015 02

[illegible]

25

[fol. 27] TRANSCRIPT OF 1940 INTER-COUNTY RETURN HOOVEN
& ALLISON Co.—Filed Sept. 17, 1942. Board of Tax
Appeals, Department of Taxation of Ohio, Columbus,
Ohio

2

6

INTER-COUNTY AND/OR CONSOLIDATED
CORPORATION RETURN OF TAXABLE PROPERTY FOR 1949

This RETURN together with the required BALANCE SHEET must be filed after February 15 and on or before March 31, 1941.

An Inter-County Return (Whether Consolidated or not) must be filed with the Department of Taxation, Intangible Tax Division, State Office Building, Columbus, Ohio.

All Taxable Property MUST be listed as of January 1, 1941, or authorized or required fiscal year end.

RETURNS ARE STRICTLY CONFIDENTIAL and SEVERE PENALTY IS PROVIDED FOR ANY PUBLIC EMPLOYEE DIVULGING INFORMATION. (Secs. 12924-7 and 12924-8 G. C.)

(PRINT PLAINLY NAMES AND ADDRESSES)

Name of Corporation The Heoren and Allison Company Organized under the Laws of the State of Ohio

Address Principal Accounting Office	Xenia, Ohio	Location of Prin. Place of Business in Ohio
-------------------------------------	-------------	---

Date of Organization June 15, 1966 If Foreign Corporation, date of admittance to do business in Ohio _____

CORPORATIONS MAKING CONSOLIDATED RETURN. FILL OUT THE FOLLOWING.

This return is made by the above named Corporation as holder of fifty-one percent or more of the common stock of the following named Corporations. See Department of Taxation Rule No. 283 on back of this schedule.

[illegible]

CORPORATIONS MAKING AN INTER-COUNTY RETURN, FILL OUT THE FOLLOWING.

This Corporation (and/or one or more of its subsidiaries) is engaged in Business in the following Counties in Ohio, as indicated below.

[illegible]

CORPORATION RETURN FORM No. 945-B-2

One Completed Form Necessary for Each Corporation Reporting in This Return.

(PRINT PLAINLY NAMES AND ADDRESSES)

Name of Corporation The Haveren and Allison Co. Organized under the Laws of the State of Ohio

Address Principal Accounting Office Xenia, Ohio Location of P.O. Place of Business stated in Articles of Incorporation Xenia

Address or other location of Actual Place of Business Xenia, Ohio Date of Organization June 12, 1928

Address of Ohio Statutory Agent Xenia, Ohio If Foreign Corporation, date admitted to do business in Ohio _____

Kind or Kinds of Business in which engaged Manufacture of Rope, Binder Twine

If name of Corporation has been changed during the preceding year, give former name. _____

THE FOLLOWING QUESTIONS SO FAR AS APPLICABLE MUST BE ANSWERED IN FULL; IF NOT SO ANSWERED, THIS RETURN WILL NOT BE ACCEPTED AND THE PENALTY FOR FAILURE TO FILE RETURN WILL BE ASSESSED.

iii. (A) Was the corporation engaged in business on January 1, 1941? YES ☒ NO ☐
(B) If not, has it commenced business since January 1, 1941, and before filing this return? YES ☐ NO ☐

IV. What tangible per. (A) PROPERTY HELD IN OHIO—

cannot properly be
owned by the Corpora-
tion and not shown
on its balance sheet
did it hold as LESSOR,
or CONSIGNMENT,
under CONDITIONAL
SALES CONTRACT
or under SIMILAR
AGREEMENT, on the
day as of which the
Corporation has listed
its own property?

In the event the taxpayer filing this report is required to pay the tax on any of this property, please list same on schedule I-C to E-C as case may require.

[illegible]

V: (A) Give here information concerning all new buildings or improvements made or erected since April 14, 1940, on any real estate in this county owned or occupied by you; also estimated increase in value of lands so held, due to development of oil, gas, coal, stone, clay, gravel and other mineral works.

<u>Item</u>	<u>(Kind of Improvement or Mineral Development)</u>	<u>(On what lot or lands situated)</u>	<u>(Approximate Increase in Value)</u>

(B) Gave here information concerning buildings, structures, timber, and other trees on hold, wholly or partially destroyed since October 1, 1940 and not restored or to be restored prior to April 13, 1941; also estimated decrease in value of land on hold, due to exhaustion or abandonment of mineral deposits within the past year.

Item	(On what lot or lands situated)	(Approximate Decrease in Value)
(Kind of Improvement or Mineral Development)		

VI. Was the Corporation on January 1, 1941, acting, or has it, since that date and before filing this return, commenced to act in the transaction of business for a non-resident of the state of Ohio, or for a foreign corporation not admitted to do business in Ohio, as agent, factor, broker or otherwise? YES ☐ NO ☒

If so, check capacity in which the Corporation acted and give name, address and nature of business as to each principal.

[illegible]

List here an estimated average value of a classified inventory of all personal property owned and used by the Corporation IN THIS STATE in MANUFACTURING or REFINING, and subject to be listed on the AVERAGE VALUE basis for the year or part thereof.

(Check the respective source of figures.) ☐ Physical Inventory; ☐ Perpetual Book Inventory. State date of last Physical Inventory: December 31, 1939

Check the Inventory Method ☐ Cost; ☒ The Lower of Cost or Market; ☐ Other Methods, outline below _____

Inventory of finished products used in manufacturing or refining NOT KEPT or STORED at the place of manufacture or in a warehouse IN THE COUNTY where manufactured or inventory held for retail sale MUST BE LISTED AS MERCHANDISE on Form No. 945 C-7.

List separately property used in each Taxing District. To list as per book accounts, see Form No. 945 A-1, Part 2.

County	Taxing District	January	February	March	April	May	June	July	August	September	October	November	December	Total Monthly Inventory Values	Average Monthly Inventory Value (divide by total number of months in business)	Listed Value 50% of Average Value
Craws	Xenia City	488 344	495 679	523 000	534 013	531 019	509 111	261 797	275 773	282 741	230 234	226 218	234 021	4 645 039	386 005	193 007
	Imports	274 892	242 170	228 212	197 233	171 670	167 617	206 790	237 802	222 762	207 577	222 091	230 360	2 161 791	221 790	110 893
													757 380		608 785	307 390
	<i>Paul Smith report</i>															
	Kalam. Shet 19-39															
	Kar Mat															
	Wine P															
	Finished gum. Co															
	Applied															
	Finished Oil															
	Reported on															
	C-6 19-39															
	Imports															
	C-7															

11,457 inv. 24

INSTRUCTIONS—Use of Form 945 C-1.

MERCHANDISING OR SIMILAR INVENTORIES LISTING FORM.

This Form is to be used by Merchants in listing their average monthly Inventory Values. To fill out this schedule, insert the county name in the column at the left side of the sheet and then to the right of this the various Taxing Districts in which Tangible personal property of this type is located. Opposite each Taxing District named, enter in the columns provided the information as required by the Form, totaling such values in the column headed "Total Monthly Inventory Value". In the next column show the Average Monthly Inventory Values and then extend for listing purposes to the 70% column such values for each Taxing District. The totals as arrived at the listed value column must be carried forward to the recapitulation Form 945 D.

List values in dollars only and make all items end in 0, viz., 100—110—120.

Segregate inventories of consigned goods and give name and address of consignor.

RECAPITULATION OF LISTED VALUES OF TANGIBLE PERSONAL PROPERTY

County	Taxing District Townships, Special School Districts, Cities and Incorporated Villages	Domestic Animals & Agricultural Products (From Form No. 945 C-1)	Watercraft, Aircraft & Electrical Equipment (From Form No. 945 C-2)	Engines, Machinery, Tools & Implements (From Form No. 945 C-3)	Manufactur- ing Inventories (From Form No. 945 C-5)	Merchan- dis- ing Inventories (From Form No. 945 C-7)	Other Per- sonal Property Used in Business (From Form No. 945 C-8)	Taxing District Listed Value Totals	County Listed Value Totals (extend taxing district totals for each County)
Deane	Xenia City			121100	193 697		4 500		319180
Hamilton	Cincinnati					1 679			167
7-2-41 corrected per EHRHART Report Imparts Added Back									
	XENIA			121100	301370		4560	430000	
					110245		Farmer	319180	
								110245	

Recapitulation of Classified or Intangible Personal Property Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Productive Investments	None	5%	
Item 2 (From Schedule 7) Unproductive Investments	None	2 mills	
Item 3 (From Schedule 8) Deposits	303,750	2 mills	607.48
Item 4 (From Schedule 9) Credits	58,510	5 mills	292.55
Item 5 (From Schedule 10) Money and Other Taxable Intangibles	25,000	5 mills	125.00
Total Amount—Aggregate Listed Value and Classified Tax (Add above Classified amounts)	687,260		783.71

OATH

(Corporate seal should be impressed so as not to affect the legible reading of any written words or figures.)

STATE OF OHIO, Greene COUNTY, ss.:

We do solemnly swear that we are the President and the Treasurer of the above named Corporation and do further swear that the answers which we have given to the specific questions asked in the foregoing tax return, so far as within our knowledge, are true; that the list contains a full disclosure of all property required by law to be listed for taxation on behalf of said Corporation; that the amounts which we have set down therein in our itemization of taxable property are, so far as they represent facts within our knowledge, true and correct; and that, in all cases in which we have answered any such question, or given any such amount, otherwise than from our own positive knowledge, such answer or amount represents our opinion and judgment, based upon the best information available to us.

SWORN to and subscribed before me this 20th day

(Sign here) Charles L. Darlington

of April, 1941.

Title President

Clara E. Marshall

(Sign here) E. D. Martin

Notary Public—Notary—Deputy—Assistant

Title Treasurer

Was this Return prepared by persons within your own organization? If answer is "NO," show in space below the name and address of person or firm who prepared the return:

Name Address

Balance Sheet for Inter-County and/or Consolidated Corporations

Indicate whether this year and
corresponds with that on your
Federal Income Tax Return.
☒ Yes. ☐ No.

FOR (Name) The Hacten and Allison Company (Address) Xenia, Ohio Year Ended December 31, 1939

Balance Sheet Item No.	ITEMS ASSETS	OHIO ANALYSIS COLUMNS END of Year			BEGINNING of Year TOTALS	FEDERAL COLUMNS As Reported for Federal Income Tax END of Taxable Year	
		AMOUNT		TOTAL		AMOUNT	TOTAL
		WITHIN OHIO	WITHOUT OHIO				
	CASH—						
1	On deposit in Ohio banks and/or Building and Loan Associations, taxed at source.....	191 832 41	44		151 299 21		540 780 28
2	On deposit elsewhere within Ohio [Sch. 8].....						
3	Unwithdrawable deposits in { A. State Bank (Taxed at Source, Nov. 12, 1940)..... Ohio financial institutions closed November 12, 1940 { B. National Bank (Sch. 10) (250 00	Sch 10				
4	On hand or otherwise not taxed at source [Sch. 10].....						
5	ON DEPOSIT OUTSIDE OF OHIO: Yielding annual income exceeding 4% of principal sum withdrawable [Sch. 6 (C)]						
6	Not yielding such an income		345 320 87				
7	Deposits for entire business of owner [Sch. 8 for Ohio Corp.].....						
8	Other deposits, withdrawable in course of business by office without Ohio		3 177 04	540 780 28			
9	NOTES RECEIVABLE						
10	Less Book reserves for bad debts.....				2 207 59		1 382 11
11	Due within one year from date of inception [Sch. 9, A-1, A-3].....		1 382 11				
12	Due after one year from date of inception: a. Interest bearing (whether productive [Sch. 6 (C)] or unproductive [Sch. 7 (B)]				1382 11	Sch 9	
	b. Non-interest bearing [Sch. 10].....						
13	ACCOUNTS RECEIVABLE	140,306.81					
14	Less Book reserves for bad debts.....	40,862.94			77 426 84		28 055 82
15	Due within one year from date of inception [Sch. 9, A-1, A-3].....						
16	Due after one year from date of inception: a. Interest bearing (whether Productive [Sch. 6 (C)] or unproductive [Sch. 7 (B)]		67 557 08	30 498 74		Sch 9	
	b. Non-interest bearing [Sch. 10].....			28 055 82			
	INVENTORIES—						
17	In manufacture: Raw materials	259 820 01	12 777 36			272 597 37	
18	Work in process (including burden).....	38 226 23				38 226 23	
19	Supplies for manufacture	37 234 52				137 234 52	
20	Finished goods stored in Ohio county of manufacture	136 963 49				136 963 49	
21	Finished goods not so stored and not included below	1184 13	205 286 94			206 471 07	
22	Consigned to others (Describe fully—see reference 4).....						
23	Goods stored in public warehouse						
24	Supplies not for manufacture and not included below						
25	In agriculture: Products on farms						
26	In merchandising, mining, and other business: Goods held for sale						
27	Supplies and/or other inventoried goods.....						
28	Materials and supplies used in generation or distribution of electricity for others						
29	Grain not subject to property tax						
30	Other (Federal or Ohio).....			691 092 67	1022 015 02		691 092 67

Do not check
with return
for next year
applied

INVESTMENTS—Non-Taxable—

- 31 Stocks of Corporations other than listing corporation
- 32 U. S. Government, District and Territorial Bonds
- 33 Other Non-Taxable Federal Securities
- 34 Ohio Municipal, County, School and other local bonds issued prior to Jan. 1, 1913

INVESTMENTS—Taxable—

- 35 Productive—
Other Bonds, Certificates of Indebtedness, Debentures, Notes and Other Interest-Bearing Obligations yielding income
- 36 Unproductive—
Other Bonds, Certificates of Indebtedness, Debentures, Notes and Other Obligations not yielding income

37 DEFERRED CHARGES (a)—Prepaid Insurance [Sch. 9, A-1, A-3]

38 Prepaid taxes [Sch. 9, A-1, A-3]

39 Enter in Detail on Form 945N { All other Intangibles [Sch. 9, A-1, A-3]

FIXED ASSETS—

- 41 Land (2)
- 42 Buildings
- 43 Less reserves for depreciation (1)
- 44 Machinery and Equipment taxed as Real Estate
- 45 Less reserves for depreciation (1)
- 46 Machinery and equipment:
- 47 a. Used in manufacturing, mining or agriculture
- 48 Less reserves for depreciation (1)
- 49 b. Used in other business
- 50 Less reserves for depreciation (1)
- 51 c. Lensed and/or loaned to others
- 52 Less reserves for depreciation (1)
- 53 Furniture and Fixtures
- 54 Less reserves for depreciation (1)
- 55 Delivery Equipment (Show automobiles separately from other equipment)
- 56 a. Used in manufacturing, mining or agriculture
- 57 Less reserves for depreciation (1)
- 58 b. Used in other business
- 59 Less reserves for depreciation (1)
- 60 c. Automobiles and Trucks licensed in Ohio
- 61 Less reserves for depreciation (1)
- 62 Others:
- 63
- 64
- 65 Less reserves for depreciation (1)

66 TOTALS OF FIXED ASSETS FEDERAL COLUMNS

67 LESS TOTAL RESERVES FOR DEPRECIATION

68 NET TOTALS FIXED ASSETS

69 PATENTS and COPYRIGHTS—yielding Royalties or other income

70 PATENTS and COPYRIGHTS—not yielding Royalties or other income

71 GOODWILL

72 OTHER ASSETS: (Describe fully; for Ohio columns subdivide per taxing classifications.)

73

74

75

[fol. 37] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT
OF TAXATION

No. 4441

THE HOOVEN AND ALLISON COMPANY, Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of the State of Ohio,
Appellee

Proceedings and Testimony.

Before the Board of Tax Appeals, Department of Taxation,
State Office Building, Columbus, Ohio, on Thursday, April
23rd, 1942

Present: Hon. Hugh S. Jenkins, Chairman; Hon. Robert
M. Hance, Member; Hon. William J. Ford, Member.

APPEARANCES:

Messrs. Thomas C. Lavery, Cincinnati, Ohio, and Marcus
E. McCallister, Xenia, Ohio, on Behalf of the Appellant.

Hon. Thomas J. Herbert, Attorney General, by Aubrey
A. Wendt, Assistant Attorney General, on Behalf of Appel-
lee.

[fol. 38] Thursday Morning Session,
April 23rd, 1942.

Chairman Jenkins: You may proceed.

Mr. Lavery: This is an appeal, if the Court please, from
the action of the Tax Commissioner, Hon. William S. Evatt,
in denying tax exemption to a part of the inventory of The
Hooven and Allison Company, of Xenia, Ohio.

The claim for tax exemption under the Ohio statutes was
based upon a provision in the Constitution of the United
States, which, in general, forbids the taxation by the States
of imports and exports.

The Hooven and Allison Company is engaged in the busi-
ness of manufacturing rope and twine products at Xenia,
and in the course of its manufacturing operations it uses a
great quantity of hemp, sisal, and so on, which is produced
or grown in foreign parts of the world and which is brought

to Xénia in bales—I suppose bales is the proper expression to use for it—and there placed in the warehouse of The Hooven and Allison Company until they are ready to begin the actual processing of the material which finally results in the manufacture of rope and kindred products.

The questions involved in this case are, first, whether or not The Hooven and Allison Company is the importer of the various raw materials used in its manufacturing process, because it is essential, to come within the so-called “Original Package” doctrine which was laid down in the famous *Brown versus Maryland* case of the United States, it is essential that the person claiming immunity being the importer of the subject which the State seeks to tax; and, further, it is essential that the import be in the hands of the importer in the original package at the time the State seeks to levy its tax.

So we have the question as to whether or not The Hooven and Allison Company is the importer of this raw material, and we will show, or attempt to show, that under the course of business by which this raw material is brought to the United States that it is imported by The Hooven and Allison Company.

We will also offer a stipulation which has been signed by counsel for both sides setting forth the amount of the inventory involved which came from foreign sources, and also the value of that inventory, so that there will be no question in this case as to the details of the base of the tax, whether the Board should hold that we are taxable or not. In short, we have agreed as to the amounts involved and as to the sources from which the raw materials come; so that that question will not be before the Board.

There is another question in the case. Some of the raw material which is used by The Hooven and Allison Company is imported from the Philippine Islands, and of course under the usual definition of import it means an article of commerce brought from a foreign country; the question is raised as to whether or not the Philippine Islands are a foreign country so far as the United States is concerned. Of course recent events have greatly changed the complexion and the character and the status of the Philippine Islands, but this case arose before the outbreak of the War, and I suppose for the consideration of the Board and possibly the Court, it should be limited to the

legal status of the Philippine Islands as of the time this controversy arose.

We have two classes of inventory involved; first, smaller classes, that part of it that was brought in from the Philippine Islands, and, second, that part that was brought in from many other countries admittedly foreign to the United States and brought in and stored in the warehouse of The Hooven and Allison Company at Xenia.

Chairman Jenkins: What years are involved?

Mr. Lavery: The years involved are 1938, 1939 and 1940.

Chairman Jenkins: That is the tax years?

Mr. Lavery: The tax years, yes, and then there are two years prior to that time which I think are held open pending the outcome of this appeal.

Chairman Jenkins: Waivers have been filed?

Mr. Lavery: Waivers have been filed, yes, sir, but the two years are open; they are not involved in this appeal; but the determination of this case will decide what the company shall be taxed for.

Mr. Ford: One appeal involving the assessment for each of the three years?

Mr. Lavery: One appeal involving the assessment for each of the three years. We have, of course, a great many transactions involved in the course of bringing in this raw [fol. 41] material from most all over the face of the earth, and in order to simplify the facts, because, as you readily understand, if we attempted to testify as to each one of these transactions it would be an interminable hearing, we have entered into two stipulations, counsel representing the parties. The first one embodies the result of a trip to New York last September where I had conferences with the various brokers with whom The Hooven and Allison Company deals, and after I had talked to these brokers about the course of business involved in their business relations with The Hooven and Allison Company, I came back and sent to each concern a list of questions, asking each office to answer these questions severally and freely as they could.

The Attorney General's office, Mr. Wendt, has agreed to this stipulation to this effect, that the questions listed here were submitted to the witnesses indicated; that the witnesses if they had been called to testify here today would have testified as set forth in the replies to the questions which were asked.

Now at first we thought that we could make some summary statement of these replies without setting forth the exact questions which were submitted, but the way the replies came in it is difficult to set opposite each question the precise answer that was made to it; so, after consultation, we thought it the better procedure to put in the questions as they were asked and then put in the replies as they were received. So this stipulation embodies the questions and the original answers which were made by these various brokers [fol. 42] etc. There were five of them.

Now the other stipulation is, as I have said, merely an agreement as to the countries from which the raw material came and as to the values of such raw materials as they stood on the books of The Hooven and Allison Company in these years which are involved in the appeal.

The replies in the first stipulation set forth in some detail the nature of the course of business between The Hooven and Allison Company and the producers and foreign sellers of the raw material which they produced. The course of business is set forth from the point of view of the brokerage office.

We thought it would also be advisable, and Mr. Wendt went along with us in this suggestion—in fact, I think it was his suggestion—that we have one of the Company's officers here to give the facts as to the course of business from the point of view of The Hooven and Allison Company. So we have Mr. Martin here today to testify as to the nature of the course of business of The Hooven and Allison Company, and we will offer his testimony at the proper time. I don't think it should take very long but Mr. Wendt will probably want to ask him some questions too.

Now, with that outline of the issues of the case, we are ready to proceed unless Mr. Wendt has something to say.

Mr. Wendt: If it please the Board, I think of only one other question that is raised as an issue in this case, and that is, When do imports, is such there be here, cease to be [fol. 43] imports? May an importer, if there be an importer in this case, take steps which would cause those materials that are brought into this country as imports to cease to be imports?

The rule, of course, as expressed by Mr. Lavery, is that an original package once broken is no longer an import but the goods are then mingled with the mass of property in this country. We think there may be other things which

would cause such materials to cease to be imports in Article I, Section 10, of the Federal Constitution, and will probably discuss those later on in brief.

Mr. Ford: Does the stipulation formally show that the duties on the property in question were paid at the ports of entry or the custom offices, or are we to assume that?

Mr. Lavery: The stipulation has embodied in it a number of standard forms of contract which are used by all these brokerage firms; they are essentially all the same.

Chairman Jenkins: Are we to assume then the terms of the contract have been complied with?

Mr. Lavery: No, we will make some showing as to that. As a matter of fact, this contract, as the brokers' replies indicate, has been in use for some time; some of them said for almost one hundred years. We are going to show that in the case of The Hooven and Allison Company at least some of the terms of this contract are not complied with; that is, the course of business is different from that prescribed by the contract.

As to the first question, without stopping to find this in [fol. 44] any particular contract, I think the answer is that the duties are paid, the custom duties, if there are any, are paid by the buyer, but that I will have to bring out.

Mr. Ford: Who do you mean, the buyer? Isn't that probably one of the big points of the case, as to who the buyer is here?

Mr. Lavery: We intend to show that the purchase is made by The Hooven and Allison Company of the goods while they are in foreign countries and from that time on whatever is done is merely for the convenience of transit in getting them to Xenia.

Mr. Ford: Well, somebody is supposed to pay the duties, and my question was whether that was formally shown?

Mr. Lavery: I am sure that is covered here; I am trying to find it.

Mr. Ford: Because, as I recall, some of the Court decisions incorporate that as a condition to the right of immunity.

Mr. Lavery: Perhaps we should wait until we put Mr. Martin on the stand. What was your question, Mr. Chairman?

Chairman Jenkins: My question was, are we to assume the terms of the contract have been complied with?

Mr. Lavery: That we will show; there was some variance from the exact terms of the contract; and I want to say too that I agree with Mr. Wendt's analysis of the problem here, that one of the issues, probably the main issue, is whether or not the so-called Original Package doctrine as laid down in the Brown versus Maryland case applies to this particular kind of a situation; that is, whether the general language used there by the Supreme [fol. 45] Court should be held to cover the situation which we will develop in connection with this case.

Are you ready now?

Chairman Jenkins: Yes.

Mr. Lavery: This is my first appearance before the Board. Do you swear the witnesses?

Chairman Jenkins: Yes.

Mr. Lavery: Mr. Martin, will you take the stand?

Be It Remembered That the Appellant, to maintain the issues on its part to be maintained, introduced and offered in testimony on its behalf the following evidence, to wit:

[fol. 46] E. D. MARTIN, called as a witness, on behalf of the Appellant, being first duly sworn, testified as follows:

Examined by Mr. Lavery:

Q. What is your name?

A. E. D. Martin.

Q. Where do you live, Mr. Martin?

A. Xenia, Ohio.

Q. What is your occupation?

A. General manager and treasurer of The Hooven and Allison Company.

Q. How long have you been employed by The Hooven and Allison Company?

A. Twenty-seven years.

Q. What is the nature of The Hooven and Allison Company; is it a corporation or a partnership?

A. It is a corporation.

Q. When was it organized, Mr. Martin?

A. June, 1888; June 13th, to be exact.

Q. Under the laws of what State?

A. Ohio.

Q. Will you give us a brief account of the nature of the business in which the company is engaged?

A. We are manufacturers of Manila Sisal, hemp, cordage, twines, packing and oakum binder twine and similar products.

Q. That is packing and oakum?

A. Yes.

Q. What kind of raw material is used by The Hooven and Allison Company in its manufacturing operations?

A. Well, principal materials are Manila hemp from the Philippine Islands, and Java sisal from the Dutch East Indies; what is called African sisal from the British and [fol. 47] Portuguese East Africa; Mauritius hemp from the Island of Mauritius; Jute from India, and the soft hems from Italy and the Balkan States and South America. And we use some domestic binders, sisal or Henequen from Mexico and Cuba; and istle from Cuba. Those are the principal things.

Q. Do you ever obtain any of your raw material from sources within the United States?

A. Very rarely. We do, yes, but there isn't much hemp grown in this country and there is really not a large enough field.

Q. Is any of the raw material involved in this case which you obtained from sources within the United States included in the present inventory?

A. None whatsoever.

Q. What is the process by which you obtain this raw material, Mr. Martin? Will you describe the course of business by which you get your raw material from these various places throughout the world?

A. We obtain our material almost altogether from the United States agents of foreign producers. Our principal connections consist of five concerns, R. L. Pritchard & Company; these are all in New York City; Hanson & Orth, James Fyfe, Macleod & Company and Stein, Hall & Company; they are the agents for the Java sisals.

Q. Mr. Martin, will you describe the negotiations between The Hooven and Allison Company and these brokers by which you obtain your raw material?

A. Well, when we are in the market for fiber, we usually contact these agents in New York, or, on the other hand, [fol. 48] they are putting out offers right along on their materials which they communicate to us by telephone or telegraph; usually that way, occasionally by letter. What

happens is that if we want to buy a certain grade of fiber we get in touch with the agent, or several agents sometimes handling the same fiber, to find out what their prices are. If we can't get together on a price we usually make an offer of what we think we want to pay, which they cable out to their principals; it takes about a day; the next day we get a reply. If we are in agreement to make a purchase covering the quantity we want, price, time we want it shipped, quite often the routing of it—we sometimes like to favor certain steamship companies that buy rope from us—if finally those agreements are agreed to, they send us a contract, which usually comes in duplicate, signed by the agent on behalf of the principal, and we sign it and send it back. That is the first step in making the purchase.

As soon as the fiber is ready, and quite often we buy fiber that hasn't even been produced if we want a late shipment, as soon as the fiber is ready we get a declaration, that is usually by mail, by the agent, stating that so many bales of this fiber is on such and such a boat, sailed from Manila or Java on such and such date, and they generally tell us the approximate date of arrival; and about the time the material arrives at the port of entry we receive either further notice or usually a pro forma invoice.

Q. What is a pro forma, Mr. Martin?

A. Well, it gives the approximate tonnage and value of [fol. 49] the shipment; on our part it is not a very essential document; the exact uses that the agent has for it beyond that, I don't know. It is intended to give us—you see, this fiber when it comes in has to be weighed,—any detail, etc. The shipments when they are originally shipped are earmarked on the vessels for us. Pro forma gives us an approximate idea of how the shipment is going to turn out, the exact pounds and the value. The original declaration is a very vague document, saying approximately 500 bales may be in shipment; the pro forma will show the correction of that, 496 bales, for instance.

Q. Now when the goods arrive at the port of entry in the United States, what happens there?

A. Well, when we get the pro forma we are generally requested to give a routing of the material shipped to Xenia. It is brought through the customs and weighed and shipped to us on the ordinary straight bill of lading to Xenia.

Q. By rail?

A. Almost altogether. Occasionally we have a differential route where we ship it down through Norfolk to save a little freight.

Q. Who pays the customs duties, if there are any, or are there any custom duties on the kind of material you bring in?

A. The only material that has a duty is true hemp; there is no duty on these other fibers.

Q. Who arranges for clearing the shipments through customs and arranges for weighing, and so on?

A. That is part of the deal. When we buy, we arrive at [fol. 50] a price which includes the freight, cost at origin, insurance; that is the service that the agent renders us, included in the price, as a matter of convenience; we are located out at Xenia, Ohio, so they do that and it is charged in the cost of the goods.

Mr. Ford: That is, the duties, if any, are charged in the cost?

The Witness: Whenever we buy an item that has a duty on it they will quite often give us a price both ways, if we want to buy that way, but we always buy duty paid; we are located in Xenia; we never go back and pay the duty ourselves.

Q. When you speak of the agents, that is, a part of the agents' services in connection with the deal, you mean by "agents" the brokers with whom you originally negotiated the contract?

A. That is right.

Q. When the goods are put on board cars at the port of entry how are they shipped to Xenia, what kind of shipment document is issued to cover that part of it?

A. You mean the type of bill of lading?

Q. Yes.

A. Straight bill of lading.

Q. Do you have to surrender that bill of lading before you get possession of the goods at Xenia?

A. No, except that—no, in our case that would be a matter between us and the railroad.

Q. When do you pay for the goods, Mr. Martin?

A. Well, when the goods are finally in and weighed and shipped, we get what we call a final invoice; I think on an

[fol. 51] average we pay for the goods immediately after it arrives in Xenia, or within ten or fifteen days, supposed to pay.

Q. Are the goods paid for before they are delivered to you by the carrier?

A. No, sir.

Q. Or afterwards?

A. Never that I can think of.

Q. Make your statement a little clearer, Mr. Martin; are they paid for—let me ask you again, are the goods paid for by you before they are delivered to you by the carrier at Xenia?

A. No, sir; as I stated, we generally pay ten or fifteen days after that.

Q. So that in effect these transactions with you, would you say, are credit sales or not?

Mr. Wendt: Object.

Chairman Jenkins: What is your objection, Mr. Wendt?

Mr. Wendt: That is a matter for the Board to determine, whether they are credit sales, from the facts; that is a conclusion.

Chairman Jenkins: You may answer; objection overruled.

A. Why, certainly they are credit sales.

Q. Now when the goods reach Xenia and they are delivered to you by the carrier, Mr. Martin, what do you do with them at that time?

A. We place them in the raw material warehouse and hold them until they are needed.

Q. How long are they kept in the warehouse usually before they are used? Is there any definite time in which they are kept there?

[fol. 52] A. No; it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances and we do not carry any more inventory than we need to; it takes three to six months for it to get to us; we attempt to keep a backlog for that; we attempt to run our business with a minimum working inventory, of course.

Q. When you take the fiber out of the warehouse do you make a bookkeeping entry to show that it has been removed from the warehouse and charged to some other part of the operation?

A. Certainly; it is removed from the raw material account and charged into processing in the mill; each bale of fiber as it is removed from the raw material warehouse becomes, according to our records, in process. Of course we have to batch and treat this stuff; it may not be used for a couple of days; but as soon as it leaves the warehouse it is charged in process; the usual procedure in any class of goods, I suppose.

Q. You have one record of the inventory in the warehouse and another record of the goods in process and when the goods are taken out of the warehouse and the bales are broken, then there is a charge in process?

A. If they are taken out of the warehouse they are charged in process whether they are opened or not. We have three accounts, the raw materials account, goods in process account and a finished goods account.

Q. Now as to the goods in the raw material account in the warehouse, is any use whatever made of those goods until you are ready to put them in the course of your process [fol. 53] essing?

A. No.

Q. In what condition are those goods in the warehouse? Are they in the original package in which they are brought into the country or are the packages broken?

A. Well, they are in the original package; there might — a bale burst occasionally in transit; outside of that they are in the original package.

Q. Will you describe how they come in; will you describe what is the original package in connection with your business? I mean just a description of what the package is.

A. Well, all fiber comes in bales, ranging 200 to 1000 pounds; for example, Mexican sisal, which does not have to come so far overland, is not compressed so tightly; Java is put up under hydraulic pressure and is very tightly packed; those bales weigh anywhere from five to eight hundred pounds; they are all lashed, some in steel bands, some with fiber bands; they all have a common characteristic, about four feet high by two by three feet.

Q. Are they covered by some kind of a wrapping?

A. Manila fiber is covered by a sort of a reed; sometimes it isn't; the other fibers as a rule have no wrapping.

Q. They are merely bound together with what kind of binding?

A. Fibers lay parallel, the average fiber about three to

four feet long, and it is just packed down with steel bands around it and shipped; it is condensed so that very little can happen to it; there is no special need for covering on it except the Manila fiber.

Q. Are there any markings on these bundles when they come in?

[fol. 54]. A. Oh, yes, they have the grade, little marks put on, presumed, by the natives, marks to identify them with the transaction.

Q. Explain that a little more fully.

A. Well, in some cases in some of the fiber they go to the trouble to mark our order per transaction, on every bale; some they don't. They will use just a blue cross or something like that.

Q. What is the purpose of those markings, would you say?

Mr. Wendt: If you know.

Chairman Jenkins: If he knows.

Q. If you know, yes?

A. I can only suppose it is to identify them.

Mr. Wendt: Objection to what he supposes.

The Witness: That is the question.

Chairman Jenkins: If you know.

The Witness: In some cases because the mark coincides, because we know, we can tell what it is; in other cases I don't know exactly.

Q. Does the mark on the bale identify the shipment with any particular contract?

A. Not in every case but I would say generally where they are marked it is always with the contract tied up.

Q. Are the goods in warehouse inventory ever used as collateral to secure loans?

A. No, we have never used collateral, never used a fiber for that purpose.

Q. Are they included in your balances usually for the purpose of obtaining credit at the banks or other financial institutions?

A. No, sir; our inventory is naturally in our balance sheet, of course, but not for that purpose.

Q. Have you ever used the inventory in the warehouse as security to pay a loan?

A. Not during my time with the company.

Q. How long have you been with the company?

A. Twenty-seven years.

Q. Do you maintain any representatives in New York; do you have an office there or have any employees there?

A. No, sir.

Q. The material in your warehouse inventory, Mr. Martin, does that have to be processed before it is available for use? In short, what do you have to do with this raw material that you get from various countries before you can use it?

A. Well, of course we have to open it and prepare it; we put emulsion material on it and run it through machinery.

Q. Can it be used for any purpose whatever until you have processed it?

A. Not that I know of. I don't quite understand the question. Not that I know of.

Q. What I mean, as raw material is there any use to which you could put it before you begin your processing operation on it?

A. No, sir.

Mr. Ford: And you don't start any processing operations until you take it out of the warehouse, is that correct?

The Witness: That is right.

Mr. Lavery: I think that is all.

[fol. 56] Cross-examination.

By Mr. Wendt:

Q. Has your company had occasion to borrow any moneys during the years 1937, 1938 and 1939?

A. I think during that time we have, yes.

Q. And from whom have you borrowed?

A. Well, our principal bank is the National City Bank of New York City.

Q. Who arranges for those loans?

A. Mr. McCallister as secretary; he sends a note, if we want money we just send a ninety day note and credit it to our account.

Q. You mean there is no previous negotiation?

A. No; we have had for years—we carry our account with them.

Q. So that if your company wants some money you just sign up a company note for the amount you want, make it payable to the New York Bank and put it in an envelope with a letter probably stating the note is enclosed and send it through?

A. Oh, yes.

Q. And they send the money back?

A. Well, they don't send it back; just credit our account.

Q. No previous negotiations or preliminary negotiations?

A. Well, no, I don't know whether that is correct; they know who we are, of course, but on any individual note like that, if we want money we send a note in; that is what happens; to get any individual loan.

Q. Does that bank ask your company to make financial [fol. 57] statements from time to time?

A. I don't recall; we sent them our financial statement, of course.

Q. And what did you show them in that financial statement?

A. We showed them our assets and liabilities.

Q. Included in your assets then would be the raw materials account, would it not?

A. That is right.

Q. That is, the statement would cover the materials you have in your raw material warehouse?

A. Well, our statement includes all inventory, of course.

Q. That is all included in that?

A. That is right.

Q. So far as you know the bank relies upon the statements as one of the factors in inducing them to make the loans to you, is that true?

A. It might be; I don't know what they rely on; I imagine they rely on our reputation as much as anything else; we could sell that inventory the next day after we borrowed, as far as that is concerned.

Q. Well, now, do you ever sell any of it?

A. Any of what?

Q. Do you ever sell any of your raw material in your inventory?

A. I think there may have been two or three transactions in the last two years where they ran out of material and we sold it to them.

Q. So that is inconsequential?

A. Yes.

Q. So that the materials that you have purchased during the years in question have been purchased with the view of manufacturing them into hemp and twine or into rope and twine and your other products, isn't that right?

[fol. 58] A. Yes; we are not speculators; we are manufacturers.

Q. Nor you don't buy with a view of reselling the raw materials, possibly making a profit thereon?

A. No, we try to buy when it is cheap but we never buy fiber we have no use for for conversion.

Q. When you purchase materials that come in from foreign countries who chooses the boat upon which they shall be shipped?

A. Do you mean the boat or the line?

Q. Well, let us have the boat first?

A. Well, I would assume that the shipper at the other end, the principal at the other end, would do that.

Q. Who chooses the line; the steamship company?

A. Well, that is at our option; if we elect for a certain line, which has happened a great many times, they arrange for shipment over that line.

Q. Did you, during the years 1937, 1938 and 1939 choose or elect which line would bring the materials in or did you leave that up to the shippers?

A. Well, we started out, the first thing we did was to stop Japanese shipping and try to get the American flag.

Q. When did you stop Japanese shipping?

A. I would say along in '39; I don't know; it was when the trouble began to brew up.

Q. When you speak of the materials that come from the Philippine Islands, will you tell us from what point they [fol. 59] are shipped?

A. Well, most of it is shipped from Manila.

Q. Any other ports?

A. Mindanao, that section down there; I don't follow through on all those details. After I buy fiber I don't pay any attention to that, to tell the truth; I know in a general way; there might be shipments come from individual ports that I would never pick up.

Q. How do you know when materials arrive in port in this country?

A. Well, there are two things happen; we have, of course, the declaration of the vessel.

Q. And when do you receive that declaration?

A. Well, that comes as soon as it leaves the other port as soon as practical. I understand that that is cable through and then there is mail comes through with further documents that probably beats the shipment in New York.

Q. I believe the question was, how do you know when materials arrive in port in this country?

A. We get the advice from the agents, and of course we take the Journal of Commerce, which gives information on shipping. Mr. Pandaker and my personal secretary watch that; that is just a matter of interest; we may be honestly interested in getting something to Xenia as quick as we can.

Q. Do you have any one go on board the ship and examine the goods and see their condition?

A. No.

Q. Do you know who does that?

A. The agent or the inspector from the other country of [fol. 60] whom we buy; that is part of our contract price for the goods; that is a business expedient; we usually buy on landed terms contract and that is a function they perform in return for us giving them the business.

Q. Isn't it a fact then that the first formal notice that comes to you is a notice stating that the goods are on the dock at the port of entry?

A. The first notice is they have been shipped from point of origin.

Q. The first notice you receive after arrival?

A. Well, it could be—it is a pro forma invoice; there is an informal advice, a letter, we may say "have you heard anything of this vessel; is it coming in on time", etc.; we might get some information by inquiry.

Q. That is before it arrives?

A. That is right.

Q. Let us confine this after the goods have arrived and you receive some oral notice notifying you the goods are in this country and available for you; you do receive some notice, don't you?

A. We get that from the agent.

Q. And what does he tell you in that notice, that the goods are on the dock?

A. Well, the pro forma is about the time the boat docks, expected the 28th, and we probably don't hear anything more unless we are in a hurry for something; we have to

give them the route to ship on and we get an invoice with the weights of the bales and the particulars of the transaction follows.

Q. What is the next instrument you receive after the proforma?

A. Usually the bill of lading.

[fol. 61] Q. Mr. Martin, will you just rather briefly describe your factory lay-out, what buildings you have?

A. Well, we have two separate manufacturing units there in Xenia.

Q. Both in Xenia?

A. Both in Xenia.

Q. How many buildings in each?

A. Well, those are small buildings; there is about six buildings at Xenia there; there are some of them tied into each other. The large mill is a U-shaped building; the raw material warehouse is here (indicating), comes up, say, to here, and then the material goes around this way, and on this end is the finished material.

Q. The witness indicating that the raw material warehouse is at one end of the U and that the materials are taken from the raw material warehouse through the U-shaped building and coming out at the other end of the U; is that correct?

A. That is correct. That is what we call the hard fiber mill; the jute mill is more nearly a square building with a detached warehouse right next to it up a small runway.

Q. Is that the same raw material warehouse that you referred to?

A. No, that is the warehouse for other types of material. Then we have a mill we don't operate any more, that is used exclusively for warehousing, some four or five buildings away.

Q. So there are three buildings being used as warehouses, is that right?

A. Three main buildings; they are subdivided into rooms for insurance aids, of course. I would like to add, in addition to that we have materials stored in outside rented [fol. 62] warehouses at this time in Xenia.

Q. Will you confine your answers inasmuch as possible to the years 1937, 1938 and 1939, and if there are other years,

so indicate; at that time there were three principal warehouses, and was there outside storing at that time too?

A. Not that I recall; I don't believe we did have any outside storage in those years.

Q. Do you make any distinctions as to type of materials stored in these three warehouses?

A. Well, we store in the hard fiber warehouse the fibers that would go through that mill; we store over in the soft fiber warehouse the fibers intended for that mill. The third warehouse, considerably detached, an old manufacturing building, carries surplus.

Q. By "surplus" what do you mean?

A. Stuff we can't get in the other two warehouses.

Q. So there might be some hard and soft fibers and other matters too?

A. Yes, and finished goods.

Q. Any finished goods in the raw material warehouse in with the raw material?

A. No, sir. I mean there the two main raw material warehouses for the two mills. Over in the third building it is a utility proposition and we may have one room filled with finished goods; we are not allowed by insurance to mix the two.

Q. Don't you have a term "spot purchases" or something of that sort?

A. Yes.

Q. What does that mean?

A. A spot purchase means a purchase of material on spot; it is in this country:

[fol. 63] Q. So that occasionally you buy goods in this country, do you?

A. Very rarely.

Q. What would be the nature of these spot purchases?

A. Well the only occasion we would have to buy a spot purchase would be something you were short of and somebody had here, if you wanted to pay a premium for it. It would not be one-tenth of one percent of our inventory ever bought in that manner.

Q. Are there any other materials that you buy in this country other than the ones you have named that came from other countries?

A. We buy some American hemp.

Q. Where do you put the American hemp when that comes in?

A. It goes in the soft fiber warehouse; it is a soft fiber.

Q. Do you buy any other materials in this country other than the fibers that you use?

A. Oh, yes, we buy large quantities of oil and tars and repair materials.

Q. What happens to the oil and tar when that comes in?

A. It is placed in tanks, underground tanks, for use.

Q. The tar is fluid, is it, so you can pump it in and out of a tank?

A. Oh, yes.

Q. Any other materials that you buy in this country?

A. Well, any accessory we would need to run our business; those are the principal items. We buy fuel oil and coal to run our power plant, and those sort of things.

Q. I believe you stated that when goods are taken from the raw material warehouse that you make a bookkeeping entry showing the transfer from there to the goods in process account?

A. That is correct.

Q. What is the purpose of that?

A. The purpose of it is to charge it in to the goods in process and keep our cost for doing business; whenever a bale is removed from the warehouse into the mill there is a report made each day by the foreman of that department of the receipts in the warehouse, and that is charged to him.

Q. So that from a bookkeeping or auditing standpoint your company is able to tell how much you have in raw materials, how much in goods in process and how much finished, isn't that true?

A. That is right; and immediately a bale becomes process, it is more valuable, more labor put on it; it is a different type entirely.

Q. You make the same entry with respect to the oil and tar, do you not?

A. Exactly.

Mr. Wendt: I think I have covered everything there. That is all.

Chairman Jenkins: Do I understand you are through, Mr. Lavery?

Mr. Lavery: If Your Honor please, I would like to refer to this stipulation again. Perhaps we ought to number this for the purpose of the record Stipulation No. 1, and the other one, the short one, Stipulation No. 2, if that is agree-

able to the Board, so that the reporter can identify the two. I don't believe, as a matter of fact, we have offered them so far.

Chairman Jenkins: Not yet.

[fol. 65] Mr. Lavery: And I should like to present them to the Board for filing.

Mr. Ford: All right.

Mr. Lavery: I think the members are acquainted now with what they contain. I would like to ask Mr. Martin one or two questions about the contracts that are made a part of the stipulations.

And thereupon the Stipulations above referred to are offered, introduced and admitted in evidence, on behalf of the Appellant, and are hereto attached, marked respectively Appellant's Exhibits Nos. 1 and 2, and made parts hereof.

Re-direct examination.

By Mr. Lavery:

Q. In Stipulation No. 1 there is included a number of standard forms of contract which the brokers use in selling these various kinds of hemp, and so on. Now calling your attention, Mr. Martin, to the form of contract submitted by James Fyfe, covering Java fiber, the sixth paragraph provides: "Terms: Payment in New York funds on delivery on dock at destination." In your contracts is that term of the agreement carried out?

Mr. Wendt: I object.

Mr. Ford: What is your objection?

Mr. Wendt: For the purpose of the record we have provided in the stipulations that I may object to any of the questions. The facts stated are true, but I have a right to [fol. 66] object to that. We come now to the question of a written contract being here altered by the testimony of this witness, showing that the contract they have made is not lived up to in some of these forms. I don't think the witness should be permitted to testify the terms of the written contract are not the terms of the contract unless he is able to show that there was a subsequent contract made which would alter those terms. We are attempting to show by parol evidence the terms of the contract were altered.

Mr. Ford: There might be some point to your objection if this was a case between the parties, but here the State of

Ohio is a party and a contract between parties is not binding upon the State one way or the other; it is not binding upon the State, and, again, the State cannot take advantage of the binding nature of the contract.

Mr. Lavery: I brought in the Bowman case with which you undoubtedly are familiar, which holds exactly as you stated.

Mr. Wendt: I will withdraw the objection.

Q. I will ask the question again, Mr. Martin; do you in your dealings with the brokers mentioned in the stipulation pay for the goods which you buy from them when the goods are delivered on the dock at destination?

A. Never.

Q. As far as you know, have such brokers ever delivered the goods bought from store maintained in this country?

Mr. Ford: I don't believe I understand that question.

[fol. 67] Mr. Lavery: Term 8 of the contract provides that the seller may make equivalent delivery from ship or store at seller's option; that is, he may deliver from a stock in this country or he may deliver from goods brought in on board ship.

Q. In your dealings with these brokers, as far as you know, have they ever delivered any goods to you from store?

A. We never had that occasion.

Mr. Ford: You mean goods already in this country?

Mr. Lavery: Goods already in this country at the time of contract.

The Witness: That has never happened on our contracts to my knowledge.

Q. Is the course of business which you have described the course of business generally followed, or is the course of business which you have described the one you follow without exception?

A. Well, that is our regular course of business here and it is also the course of business I think of the industry. You mean my testimony here today?

Q. That is right.

A. That is the normal course of our business and I feel reasonably sure it is the usual method that they all follow.

[fol. 68] Re-cross examination.

By Mr. Wendt:

Q. Mr. Martin, when you pay for the materials to whom do you issue your check?

A. They are usually sent to the agent at New York.

Q. That is the broker?

A. Yes.

Q. With whom you have dealt?

A. Yes.

Q. Are there any exceptions to that?

A. Well, I never have anything to do with sending those checks. Not that I know of. There might be some exception but I have no information of any that I can think of now.

Q. Do you have any personal knowledge as to where the broker does obtain these goods; could he not obtain them from a store or supply in this country and send them over?

A. Well, I would say that each contract there is enough papers that could only occur with misrepresentation on the papers we receive I should say. We are advised the minute the boat leaves; we never make a transaction in fiber until we determine when we want the material and the grade and all that. What happens is that all that is then put up in this contract. Now, so far as I know, none of our people would ever ship a bale of hemp to this country unless we gave them an order for it or some other mill did. I have never known them to own any. Sometimes a mill may go wrong or some mill not take something, which accounts for spot purchases; one thing, this material, when it is over, [fol. 69] we may elect to sell it; it just so happens we don't, but if we did, that is what we would do; that would be our privilege.

Q. Aren't you primarily concerned with the type of material, the quantity, the date of delivery and its quality?

A. I would say that would be the primary concern, yes.

Q. You aren't so much concerned with where the broker gets that; whether he gets it from a ship or a warehouse, are you?

A. No, assuming that there are certain marks; as a matter of common practice you can't get the material except from these foreign countries; if you want a Soeke Mandi—I don't know how to spell it—S-O-e-k-e M-a-n-d-i—that is the name of the Soeke Mandi Estates,—

Q. We will stipulate that is the way to spell it.

A. (Continuing) You have to go to their agent and arrange for it. The spot situation covers a very small amount; there are certain brokers who may probably buy for their own account and deal in spot hemp but we don't buy that way. It would be just an accident if we did, because the price is usually higher and we generally see that we have supplies coming.

Mr. Wendt: That is all.

Mr. Lavery: I would like to make one further statement, if I may. Mr. Wendt and I have talked over this matter and we have thought for the convenience of the Board it might be advisable to suggest that after this transcript is available that we try to get together and agree upon a statement of facts in the case. I don't know whether that [fol. 70] sort of procedure is ever adopted by this Board or not; but wading through this stipulation and through this record we thought perhaps we could save the time and labor of the Board if we first did that.

Chairman Jenkins: We have had worse mixed-up matters than that and we don't mind it at all.

Mr. Lavery: Then I will withdraw that statement.

Chairman Jenkins: Are you through?

Mr. Lavery: Yes.

Chairman Jenkins: Are you through, Mr. Wendt?

Mr. Wendt: Yes.

Chairman Jenkins: Do I understand you to say that it is only in very rare instances that any of your raw materials are purchased spot?

The Witness: I don't believe we have bought ten cars of spot hemp in the last twenty years.

Chairman Jenkins: Now these firms with which you deal—

The Witness: Could I say one thing there?

Chairman Jenkins: Yes.

The Witness: Of course domestic fiber is not involved in this case.

Chairman Jenkins: That was my understanding.

The Witness: Spot is foreign fiber that happens to be brought in here by a speculator or accident and gets on the market.

Chairman Jenkins: Are these firms with which you do [fol. 71] business, by that I mean are they foreign concerns or corporations operating outside of this country and having agents here?

A. Their status is this, they are usually partnerships—why, I don't know—but they are the agents for—Stein-Hall, for instance, is the agent for H. V. A., practically the Netherlands Government; that is the initials of a very long name, who are the big T sisal, the biggest exporters from the Dutch East Indies, practically a subsidiary of the Netherlands Government, I would say. In turn, Stein-Hall export things from this country. Hanson & Orth in turn are agents for Soeke Mandi. They are partnerships in this country, as far as that is concerned, American Companies, if that was your question.

Chairman Jenkins: That was my question.

The Witness: Yes.

Chairman Jenkins: When you submit an offer to these agents, so-called, in New York, is the confirmation from the agent or from the principal?

The Witness: No, it is all from the agent, who is the principal in this country; he is their agent; what happens, if we submit an offer it is cabled out; we usually receive from Stein-Hall "We have received confirmation of your offer", or maybe it will be a counter-offer, and sometimes we dabble around over as much as one-sixteenth of a cent when you are running into hundreds of tons of it; so really our negotiations with our five principal people are quite informal; very often make a deal over the telephone; it is a matter of mutual trust and confidence over a long time. [fol. 72] Chairman Jenkins: Then all your negotiations are carried out with their agents in New York?

The Witness: Yes. Principals will sometimes make a visit. We have an occasion where one of the principals was here from the Dutch East Indies talking over things and made a deal with him; the agent was there too—just a courtesy order, and happened to be a big one, a thousand tons of stuff. But the reason for the agents is they understand things here and those are big distances and quite often transactions have to be consummated quickly. The market may shift. It is so sensitive that if we make a bid or offer something at two o'clock and call back at three, unless they want to do it, it is gone.

Chairman Jenkins: Now this invoice that has come to you, is that from the agent?

The Witness: That is right.

Chairman Jenkins: From the agent?

The Witness: Yes, this contract, when it is signed, and I think the invoice also, says on there that he is the agent for so-and-so in this transaction.

Chairman Jenkins: Now the checks, when they are mailed to the agent, are they made payable to the agent or the principal?

The Witness: If I may I would like to ask the auditor. I think he signed some of those checks; I don't know—supposed to be.

Chairman Jenkins: To the agent?

The Witness: To the agent. Are any of them made to the bank?

[fol. 73] The Auditor: No, all to the agent.

The Witness: The agent carries practically the complete function of the principal except he cannot sell anything until he gets confirmation. Occasionally he will have an offer come in "You may sell 500 tons today at such and such a price", and that is good for one day, get a blanket authority for one day to dispose of the material; in that case no confirmation is necessary; and if we are interested we will advise of that, and I suppose three-fourths of this stuff goes out by telephone.

Mr. Ford: This is on the record and directed to counsel on both sides. Do I understand that it is agreed in this case that the property in question here as inventoried was all in the warehouse or warehouses of the company on the respective tax dates in question as distinguished from the processing department of the company?

Mr. Lavery: The stipulation reads this way: "It is agreed by and between counsel for the respective parties to this proceeding that the tangible personal property in appellant's inventory in the original packages in which such property was imported into the United States from countries other than the Philippine Islands and from the Philippine Islands during the taxable years 1938, 1939 and 1940, came from the sources and had the value herein set forth."

Now that is the goods packaged in the original packages in which said property was imported into the United States, we have agreed what it was and where it came from and that it was in the warehouse.

[fol. 74] Mr. Ford: My particular question is, is the company claiming immunity with respect to any property in the original package that has been taken from the warehouse into the processing?

Mr. Lavery: No, we are not claiming any tax exemption for that at all; only that remaining in the warehouse in the original package.

Mr. Ford: Is that agreed?

Mr. Wendt: Yes, that is my understanding.

Mr. Ford: You have stated in the ordinary course of your business your dealing is with the agent rather than the principal represented by that agent?

The Witness: That is right.

Mr. Ford: But of course when you deal with a particular agent in New York City with respect to the purchase of a particular commodity you personally know the name of the principal who is going to deliver the commodity in the first instance?

The Witness: Almost invariably, the grade and the estate—they are mostly estates over there—the name of the estate that supplies the fiber is stipulated in the purchase. In the case of Manila fiber there is some 34 grades and there is packers, it all goes by names; S. F. A. and MacLeod Companies of Manila, it is called the Mack Brand.

Mr. Ford: If you can understand, the question I asked you, how is the price fixed, the amount that you are to pay on a particular order, how is that fixed with respect to [fol. 75] the point of delivery, as to whether it is, let us say, f. o. b. New York, the port of entry, or f. o. b., let us say, Xenia?

The Witness: Well, in our case it is always bought f. o. b. port; some of the brokers quote a delivery price to Xenia if you want it; we don't deal that way. The price includes, as a practical matter, what we call and have arrived at by long dealing, a landed price, incorporate what they want for the hemp at origin, plus normal ocean freight and insurance, and the clearance through the customs. Now we carry beyond that increased value insurance, something that we pay five cents a pound for; if it goes down on the ship it is worth ten; that costs us extra; war risk insurance included in the original fixed price or the normal known cost, ocean freight, standard insurance and the cost to the agent here or his help, inspecting the bales, laying it in and preparing it; we arrived that way at a price of six cents a pound for — sisal; it includes premium insurance up to one-half of one per cent. Now if the insurance goes up or the freight rate goes up or down on your contract, the price shifts on those things. War insurance has gone

up to 25 percent on jute right now; we have only got three or four contracts for jute right now, but we will have to pay a premium to cover that. So the landed term price covers the usual things, what they want for the hemp at the other side, plus the known freight and known insurance and the price to get in, that is perfectly agreeable and understood between us, and incorporates those things; then the variances are for our account; if freight goes up, we have [fol. 76] to pay it; if it goes down we get the benefit of it.

Mr. Ford: Well, included on the check for a particular order, which check I understand is in all cases made payable to the agent rather than the principal, is included the freight rate in all cases?

The Witness: That is right, it is a landed price.

Mr. Ford: Landed price. I am talking about freight, where I also include railroad freight.

The Witness: No railroad freight in there.

Mr. Ford: Is that a separate matter between you and the—

The Witness: It is all shipped to Xenia in the normal manner.

Mr. Ford: That goes and is paid direct to the railroad company?

The Witness: Yes. We agree on a price and time and condition and quality on material landed, we will say, New York City; quite often we specify Baltimore because it is two cents less freight to Xenia from Baltimore; we use that a great deal but the steamships won't promise to go there. Our deal with the seller is to get that material landed to a port of entry and cleared through and then it is turned over to us. I want to correct one thing; you have asked if the check included everything. I want to ask about insurance. Do we sometimes issue extra check on war insurance?

The Auditor: Yes.

The Witness: They do those things for us; we can't be [fol. 77] running down there every time a ship comes in.

Mr. Ford: One more question. You have stated, as I recall, that no representative of your company goes down to New York or any other port of entry to examine the goods to see whether they measure up to requirements with respect to quality or otherwise?

The Witness: No, the agent does that for us and we inspect them again in Xenia.

Mr. Ford: Now suppose when it gets to Xenia you inspect it and find that the goods are so inferior that you do not feel you are required to accept the goods under your contract, what do you do about it?

A. Well, we put in a claim in that case and it is usually worked out by arbitration as to what was fair; we never received anything that wasn't fit to use.

Mr. Ford: Under your course of business what would you say as to your understood rights between you and the agent and also between you and the principal as to your right to reject at Xenia if you find that the goods were so inferior that you could not use them?

The Witness: Well, that has never come up.

Mr. Lavery: May I say a word there off the record? All these contracts have an arbitration provision.

The Witness: What would happen then, they would select some neutral importer, and we would, and we would go to arbitration; there is an arbitration clause in the contract. I have never known of but one occasion in recent years [fol. 78] where the material did not prove good and they gave us an adjustment of price and they disposed of it.

Mr. Ford: Do you have any right under your contract to reject absolutely and not use it and not pay for the goods?

The Witness: Well, if it was bad enough we wouldn't probably pay for the goods; I don't know what kind of a lawsuit that would bring about but it would probably result in our having no dealings with them.

Mr. Ford: In the course of business and the contract both together, as to whether you would have a right to reject the goods absolutely or whether you would be permitted to claim over against the agent?

The Witness: Well, I would say if we couldn't get together we would probably have to resort to the arbitration clause; as a matter of actual fact we had that happen on some far; of course that wasn't imported.

Mr. Ford: What as to the course of business, which has been going on with these agents for many years?

The Witness: That is correct.

Mr. Ford: When do you consider that the property is yours for the first time?

Mr. Wendt: Object.

Mr. Ford: Save your exception.

The Witness: Well, we are certainly responsible for it the minute we make a contract for it.

[fol. 79] Mr. Ford: When do you figure that the title to the property is yours so you can use it in making ropes and other cordage, and what not?

The Witness: Well, I would say the minute it is shipped, I think we have a perfect right; we can re-sell it on the high seas if we want to.

Mr. Lavery: What do you mean by that, Mr. Martin; shipped when?

The Witness: Put on board a vessel; the original owner has parted company with it; I would say it is on its way to us and our goods, as near as I can determine.

Mr. Ford: But it is sold f.o.b. New York?

The Witness: That is right. That is a custom that has gone on for a long number of years; it is largely a matter of convenience; otherwise, if it wasn't for that, I don't suppose these agents would stay in business; if we had to buy c.i.f. there would not be much excuse for them.

Mr. Ford: What do you mean by c.i.f.?

The Witness: That means; cost, insurance and freight from the other end; the minute it is on a boat we assume cost, insurance and freight; this is practically the same as c.i.f., except it has been the excuse for these agents to serve a purpose for us as a go-between.

Chairman Jenkins: Well, then, Mr. Martin, if what you say is true, title you mean would pass the minute it is on the boat?

[fol. 80] Mr. Wendt: Object.

Chairman Jenkins: Save your exception.

The Witness: I didn't understand that. It seems to me we have the control of it, and the only people; the agent certainly couldn't resell it.

Chairman Jenkins: You said the agent inspected the bales?

The Witness: That is right.

Chairman Jenkins: And took an actual invoice of it on the dock, say at Baltimore or New York?

The Witness: That is right.

Chairman Jenkins: In that capacity are they still working for the principal or for you?

The Witness: Well, I would say that is really a service for us in a way in return for getting the order. They are, of course, agents for the principal, but our understanding on the landed terms is that they will do these things for us, included in the price quoted them.

Chairman Jenkins: So that actually you are paying a fee for the service but it is included in the price?

The Witness: That is exactly so, and it is so understood by me and I am sure by the agents.

Mr. Ford: You have spoken of this agent as a go-between; as I understand that, a go-between between principal or agent at Manila on the one hand and your company on the other?

The Witness: Yes, that might be an unfortunate expression, "go-between".

[fol. 81] Mr. Ford: I would infer from that that the agents in New York would be your agents as well as the agent for the principal in Java or Manila, as the case might be?

The Witness: I don't think he is in any sense our agent.

Chairman Jenkins: Does he look to you at any time for his compensation?

The Witness: Well, that is all included in the price.

Mr. Lavery: Do you pay him as an employe of your company?

Chairman Jenkins: No, as his agent.

The Witness: It is perfectly understood when we make the contract that he is going to do these things, inspect it and weigh it in and it is in the understanding of purchase that he does that.

Mr. Ford: Where does this agent get his compensation?

The Witness: I think he gets a commission from the other side on everything he sells.

Mr. Ford: You mean he gets it from them?

The Witness: How he gets it I don't know; they work on commission.

Mr. Ford: But you don't pay him any commission?

The Witness: No.

Mr. Ford: Do you pay him any special compensation for special services rendered at any time?

The Witness: No.

[fol. 82] Chairman Jenkins: Do you have any questions, Mr. Hance?

Mr. Lavery: May I ask him one more question? While the contract provides that the price is payable f.o.b. New York, you have already testified, haven't you, Mr. Martin, that in your case the price is paid after the goods is delivered to you at Xenia?

The Witness: That is correct. Well, as far as that feature is concerned—a sales slip in a department store says you can't return anything without that slip, but you do:

and this contract is very old; it covers certain terms and is a protection, I suppose, against dishonest purchasers, etc.; but I am frank, I haven't read one over for a long, long time until Mr. Lavery got me in on this.

Chairman Jenkins: That is all, Mr. Martin.

Have you offered these stipulations?

Mr. Lavery: I offer the stipulation marked Exhibit No. 1 and ask that it be made a part of the record in this case.

I also offer Exhibit No. 2 for inclusion in the record of this case.

Chairman Jenkins: They may be received.

And thereupon the Stipulations above offered were admitted in evidence on behalf of the Appellant and are hereto attached, marked respectively Appellant's Exhibits Nos. 1 and 2, and made parts hereof.

[fol. 83] And thereupon the appellant rested.

And thereupon the appellee rested.

And the foregoing was all of the evidence offered, introduced and admitted on behalf of the appellant and on behalf of the appellee on this hearing of this matter.

Mr. Lavery: When we get this transcript we have ten days to file a brief?

Chairman Jenkins: Yes.

Mr. Lavery: And then Mr. Wendt has ten days after mine?

Chairman Jenkins: That is correct.

Chairman Jenkins: The case is submitted.

[fol. 84] • APPELLANT'S EXHIBIT No. 1

Department of Taxation, Board of Tax Appeals

No. 4441

THE HOCVEN AND ALLISON COMPANY, Xenia, Ohio, Appellant,

v.

WILLIAM S. EVATT, Tax Commissioner, Columbus, Ohio,
Appellee

STIPULATION

It is agreed by and between counsel for the parties to this proceeding that the following statements may be considered as true for the purposes of this action, with the

reservation, however, to counsel for each side of the right to object to any statement or item hereinafter set forth on the grounds of irrelevancy or incompetency, and of the further right to each of the parties hereto to proffer such additional testimony as may be by him deemed competent.

The following questions have been submitted to the witnesses indicated and such witnesses, if called, would testify as set forth in the replies to such questions:

1. Who initiates the preliminary negotiations between the Hooven and Allison Company and your firm, Hooven and Allison or you?

2. How are the preliminary negotiations initiated: (a) Do you make an offer to Hooven and Allison? (b) Do they make an inquiry of you?

3. How are the preliminary negotiations brought to a conclusion?

4. Is the contract between Hooven and Allison and you a standard form?

5. Is the contract prepared by Hooven and Allison or by you?

6. If prepared by your office, is the contract formally accepted by Hooven and Allison?

7. Do you act as agent for a foreign seller in making the contract? Does the contract indicate on its face that you [fol. 85] are acting as agent for such seller? If so, what language is used so as to indicate your representative capacity?

8. At the time the contract is entered into, where are the goods constituting its subject-matter actually located: In the United States or in a foreign country?

9. Who pays you your commission?

10. How and when is the seller notified of the execution of the contract?

11. What steps are taken by the seller to appropriate the goods to a particular contract?

(a) Are the goods earmarked in any way for Hooven and Allison?

(b) When the goods are loaded on the vessel for shipment from the foreign country to the United States, to whom are they consigned? (1) to Hooven and Allison? (2) To your firm? (3) To a bank, notify Hooven and Allison, or your firm? (4) Is a draft attached to the marine bill of lading? (5) Does Hooven and Allison furnish a letter of credit to a New York bank? (6) To what extent if any are C. I. F. contracts used in your dealings with Hooven and Allison?

12. When the goods arrive at an American port, who clears them through the customs?

13. Who arranges for their transshipment to Hooven and Allison at Xenia?

14. Who pays the cost, if any, of this service?

15. Under what form of bill of lading, order or straight, are the goods shipped from the port of entry to Xenia?

16. Does the seller either in the marine bill of lading or the railroad bill of lading reserve any power of disposition over the goods?

17. Could the seller divert the shipment at any time after the goods are loaded on board ship without liability to Hooven and Allison?

[fol. 86] 18. When is Hooven and Allison required to pay the price: (a) When the goods are put on board the vessel?

(b) When shipping documents are presented? (c) When the goods are delivered on dock at destination (port of entry)? (d) After the goods have been delivered to Hooven and Allison at Xenia and upon receipt of invoice? (e) Is the sale to Hooven and Allison in effect a credit sale?

19. What is the declaration? (a) What purpose does it serve? (b) Does the declaration indicate what contract the goods are shipped to fulfill? (c) What is the "proforma" and what purpose does it serve?

20. What is the invoice? (a) What purpose does it serve?

21. Who insures the goods against risk of loss during the transit?

22. Who pays for the insurance?
23. Who is the beneficiary of the policy?
24. Who arranges for the increased value and war risk insurance? (a) Who pays for it? (b) Who is the beneficiary?
25. Who pays the wharfage, port dues, toll, or other charges of a similar nature at the port of discharge?
26. Does the standard form of contract provide for "payment in New York funds on delivery on dock at destination, title to remain in seller until goods are fully paid for" in sales to Hooven and Allison? If so, does Hooven and Allison in fact pay when goods are delivered on dock at destination, or only upon receipt of invoice after goods are delivered to Hooven and Allison at Xenia, Ohio?
27. Does the standard form of contract provide for "equivalent delivery from ship or store" at seller's option? (a) Are goods sold to Hooven and Allison ever delivered from store? (b) If so, under what circumstances?
28. Where the terms of the contract and the course of business under it are inconsistent, how can the discrepancy be explained?
- [fol. 87] 29. Has there ever been a loss at sea of goods sold to Hooven and Allison?
30. With the entire course of business in view, who in your opinion is the importer of the goods sold by you as agent of a foreign seller to Hooven and Allison? Explain fully.
31. Please furnish standard forms of contract used by you in your dealings with Hooven and Allison.

It is further stipulated that questions heretofore set forth were submitted to brokers from whom the Hooven and Allison Company purchased fibre, sisal, hemp, etc., as follows:

R. L. Pritchard & Company, 90-96 Wall Street, New York, New York

MacLeod & Company, Inc., 60 Beaver Street, New York, New York

Stein, Hall & Company, Inc., 285 Madison Avenue,
 New York, New York
 James Fyfe, 44 Whitehall Street, New York, N. Y.
 Hanson & Orth, 41 East 42d Street, New York, N. Y.

It is further stipulated that the exhibits attached hereto are the original replies of the brokers heretofore named to the questions hereinbefore set forth, as follows:

Exhibit "A": the reply of R. L. Pritchard & Company.

Exhibit "B": the reply of MacLeod & Company.

Exhibit "C": the reply of James Fyfe.

Exhibit "D": the reply of Stein, Hall & Company.

Exhibit "E": the reply of Hanson & Orth.

It is further stipulated that the forms of contract attached to each exhibit are those submitted by each broker in response to question 31 hereinbefore set forth.

Respectfully submitted; Thomas C. Lavery, Attorney for Appellant; Thomas J. Herbert, Attorney for Appellee, Attorney General; Aubrey A. Wendt, Assistant Attorney General.

[fol. 88]

Copy

EXHIBIT "A" TO STIPULATION

R. L. Pritchard & Co., 90-96 Wall Street, Fibre Brokers
 New York, September 19, 1941.

Mr. T. C. Lavery, Campus Station, Cincinnati, Ohio.

DEAR MR. LAVERY:

We have your letter of 13th instant in regard to our business with Hooven & Allison Company, Xenia, Ohio.

Some of our business with H & A is on a purely brokerage basis. In other words, we are the medium of business in several fibres between the New York representatives of various shippers and H & A, and in such cases our duties are completed when the contracts are exchanged between buyer and seller. In the following remarks we are not referring to such business, nor do we refer to occasional transactions we ourselves have with H & A in spot goods,

meaning goods which are purchased by H & A ex store or ex dock at points within this country.

Our remarks, therefore, apply to transactions between H & A and shippers of foreign goods for whom we act as Agents, chiefly Jute and to a smaller extent other fibres.

The preliminary negotiations are usually initiated by an inquiry from H & A for certain grades in which they may be interested. As we know what they use, we may make them an offer without receiving an inquiry, if we have something which we think will interest them. These negotiations will result in a price being agreed upon and we cable to our shippers that H & A have bought the lot.

We prepare a contract in triplicate on a standard form as between our shippers and H & A and we sign same as Agents for the shipper. H & A retain one copy of this contract and accept the other which we retain here, sending the third copy of same to the foreign shipper. These contracts are accepted by us "As Agents for . . ." (the foreign shipper). The exception to this is that contracts for Benares Sunn Hemp would be as between H & A and ourselves, but all other details of such transactions are in accord with other fibres.

Such contracts are entered into at the time the goods are located in a foreign country unless, as rarely happens, they have already been shipped by the foreign consignor for sale in this country.

Our commission is paid by the foreign seller whom we represent.

When the goods are shipped from origin, we receive a cable advising such shipment which we pass on to H & A.

The goods are not specifically marked as belonging to H & A but the mark on the goods which signifies the quality has in practically all cases been specified when the transaction is made. Very occasionally a grade instead of a mark is sold which would give the seller the option of shipping any mark which would conform with the quality of the grade sold.

[fol. 89] The goods are usually consigned by the shipper to the order of a Bank, notify H & A and ourselves. The draft would be drawn on a Bank with documents attached. H & A do not furnish a Letter of Credit. In the case of Jute this is done by us and the cost of same is included in the price paid by H & A. H & A do not buy C.i.f. but landed at port in the United States.

When the goods arrive at an American port the documents are handed to us by the Bank for the purpose of making customhouse entry and delivery. As a matter of service to H & A, the transshipment from port of arrival to Xenia is arranged by ourselves, H & A instructing us the route by which they wish the goods forwarded and, of course, paying the freight from port of arrival to Xenia.

The foreign shipper does not reserve any power of disposition over the goods after documents are handed to the negotiating Bank at port of origin.

The contract calls for payment by H & A on delivery of the goods on dock at port of entry in U. S. A. These terms are in practice modified to the extent that payment is not made until the goods are weighed on the dock and invoice received by H & A.

You ask for the meaning of the word "declaration". This means in our trade advice that a shipment has been made from the foreign port by a certain steamer for port of destination in U. S. A. The purpose is to inform the buyer when he may expect the goods to arrive in this country. The invoice serves the purpose of advising the buyer just how much he must pay for the goods and is based on the landed dock weights figured at the contract price. We do not use a "pro forma" invoice.

In the case of shipment from Calcutta, the insurance is covered and the premium paid by us, the cost of same being included in the price paid by H & A, except that, owing to the impossibility of estimating at time of sale the cost of coverage against war risk while on the voyage, the buyer agrees in his contract to pay the cost of war risk in excess of 1/2% of the insured value.

In the case of African Sisal, the insurance is usually covered by the seller and he or his assignees would be the beneficiary.

In case of loss at sea, we would be the beneficiaries under the policy, for the reason that, to facilitate the transaction, we had opened credits in favor of the seller.

Wharfage, port dues, toll would be paid by H & A if incurred, but they are not incurred.

The standard form of contract provides for payment in New York funds on delivery on dock at destination, title to remain in seller until goods are fully paid for. As already stated, these terms of payment are not strictly enforced by sellers when the buyer is sound and responsible.

[fol. 90] "Equivalent delivery from ship or store" is permitted by the contract, but we cannot recollect that this has ever occurred in our transactions with H & A.

If there should be any discrepancy between the terms of the contract and the actual carrying out of the transaction, we should say that it might be due to the mutual confidence which exists as to the integrity of the buyer and seller.

We cannot recollect that any goods sold through our medium to H & A have been lost at sea.

In our opinion H & A are the importers. The entire movement of the goods from first to last is the result of the order placed by H & A.

Yours very truly, (signed) R. L. Pritchard.

RLP:E.

Here Follows 4 Photolithographs, Side Folios 91-94)

MANILA CONTRACT

NEW YORK,

1. SOLD BY:

2. TO:

3. QUANTITY: About

(5% more or less)

4. PRODUCT:

5. PRICE: cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. TERMS: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.

7. SHIPMENT: At port or ports in Philippine Islands during Direct or indirect, with or without trans-shipment for the port of The goods to be shipped sound and in good order and to be taken by buyer as discharged. herein called destination.

8. Equivalent delivery from ship or store at seller's option.

9. WEIGHTS: Actual weight, less four pounds per bale tare.

10. (a) If before shipment of all the goods hereunder the rates of freight to point of destination are increased by reason of the cancellation, suspension or change of tariff as a result of, the imminence of war, or of war, or of governmental measures or interference, such increase in freight rate shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, freight rates shall decline, the buyer is to receive the benefit thereof.

The rate of ocean freight at the date of this contract is _____

(b) Where the price includes the cost of transportation from port of arrival to an interior point any change in the cost of said transportation will be for buyer's account.

11. QUALITY: If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of this contract for fibres in similar positions. Damaged, if any, to be taken by buyers at a fair allowance.

12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.

15. Any premium for war risk insurance to be for buyer's account.

16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.

17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.

18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.

Any dispute arising out of this contract or its interpretation shall be settled by arbitration in

5. **PRICE:** cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. **TERMS:** Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. **SHIPMENT:** At port or ports in Philippine Islands during Direct or indirect, with or without trans-shipment for the port of The goods to be shipped sound and in good order and to be taken by buyer as discharged. herein called destination.
8. **Equivalent delivery from ship or store at seller's option.**
9. **WEIGHTS:** Actual weight, less four pounds per bale tare.
10. (a) If before shipment of all the goods hereunder the rates of freight to point of destination are increased by reason of the cancellation, suspension or change of tariff as a result of, the imminence of war, or of war, or of governmental measures or interference, such increase in freight rate shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, freight rates shall decline, the buyer is to receive the benefit thereof. The rate of ocean freight at the date of this contract is _____.
- (b) Where the price includes the cost of transportation from port of arrival to an interior point any change in the cost of said transportation will be for buyer's account.
11. **QUALITY:** to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference, for various grades is to be taken as existing at the time of this contract for fibres in similar positions. Damaged, if any, to be taken by buyers at a fair allowance. If inferior thereto buyers are
12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. Any premium for war risk insurance to be for buyer's account.
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

ACCEPTED:—

ACCEPTED:—

BROKERS.

SELLER

BUYER

FIBRE CONTRACT

NEW YORK.

1. SOLD BY:
2. TO:
3. QUANTITY: About (5% more or less)
4. PRODUCT:
5. PRICE: cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. TERMS: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. SHIPMENT: Direct or indirect, with or without trans-shipment for the port of The goods to be shipped sound and in good order and to be taken by buyer as discharged: herein called destination.
8. Equivalent delivery from ship or store at seller's option.
9. WEIGHTS:
- 10a. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.
- 10b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.
11. QUALITY: buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within twenty days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damage, if any, to be taken by buyer at a fair allowance. If inferior thereto
12. In the event that the carrier, for reasons beyond its control, discharges the goods at a place other than destination, in accordance with its bill of lading, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. WAR RISK INSURANCE: Any premium for war risk to be for buyer's account.
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. ARBITRATION: Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner.

5. **PRICE:**
cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free) any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. **TERMS:** Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. **SHIPMENT:**
Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyer as discharged. herein called destination.
8. Equivalent delivery from ship or store at seller's option.
9. **WEIGHTS:**
- 10a. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.
- 10b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.
11. **QUALITY:**
buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within twenty days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damage, if any, to be taken by buyer at a fair allowance. If inferior thereto.
12. In the event that the carrier, for reasons beyond its control, discharges the goods at a place other than destination, in accordance with its bill of lading, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. **WAR RISK INSURANCE:** Any premium for war risk to be for buyer's account.
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner.

ACCEPTED:—

ACCEPTED:—

SELLER

BUYER

SISAL CONTRACT

NEW YORK,

1. SOLD BY:
2. TO:
3. QUANTITY: About. (5% more or less)
4. PRODUCT:
5. PRICE: cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. TERMS: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. SHIPMENT: Direct or indirect, with or without trans-shipment for the port of The goods to be shipped sound and in good order and to be taken by buyer as discharged. herein called destination.
8. Equivalent delivery from ship or store at seller's option.
9. WEIGHTS:
- 10a. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures of interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result, and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.
- 10b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.
11. QUALITY: buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damage, if any, to be taken by buyer at a fair allowance. If inferior thereto
12. In the event that the carrier, for reasons beyond its control, discharges the goods at a place other than destination, in accordance with its bill of lading, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. WAR RISK INSURANCE: Any premium for war risk. to be for buyer's account.
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. ARBITRATION: Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated by the other party shall be the sole arbitrator.

4. PRODUCT

5. PRICE:

cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. TERMS: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.

7. SHIPMENT:

Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyer as discharged. herein called destination.

8. Equivalent delivery from ship or store at seller's option.

9. WEIGHTS:

10a. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.

10b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. QUALITY:

buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damage, if any, to be taken by buyer at a fair allowance. If inferior thereto.

12. In the event that the carrier, for reasons beyond its control, discharges the goods at a place other than destination, in accordance with its bill of lading, any and all expenses incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.

15. WAR RISK INSURANCE: Any premium for war risk

to be for buyer's account.

16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.

17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.

18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.

19. ARBITRATION: Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

ACCEPTED:—

ACCEPTED:—

SELLER

BUYER

JAVA FIBRE CONTRACT

NEW YORK,

1. **SOLD BY:**

2. **TO:**

3. **QUANTITY:** About

4. **PRODUCT:**

5. **PRICE:**

cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free): any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. **TERMS:** Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.

7. **SHIPMENT:**

Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyer as discharged.

herein called destination.

8. **Equivalent delivery from ship or store at seller's option.**

9. **WEIGHTS:**

10a. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof. This contract is based on ocean freight of

10b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. **QUALITY:**

If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of this contract for fibres in similar positions. Damaged, if any, to be taken by buyers at a fair allowance.

12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.

15. Any premium for war risk insurance to be for buyer's account.

16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.

17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.

18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government (Civil or Military) of the United States and any foreign Governments, whether made prior or

cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty-free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. **TERMS:** Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. **SHIPMENT:** Direct or indirect, with or without trans-shipment for the port of herein called destination.
The goods to be shipped sound and in good order and to be taken by buyer as discharged.
8. Equivalent delivery from ship or store at seller's option.
9. **WEIGHTS:**
- 10a. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.
This contract is based on ocean freight of
- 10b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.
11. **QUALITY:** If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of this contract for fibres in similar positions. Damaged, if any, to be taken by buyers at a fair allowance.
12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. Any premium for war risk insurance to be for buyer's account.
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

ACCEPTED --

SELLER

ACCEPTED --

BUYER

BROKERS.



[fol. 95]

EXHIBIT "B" TO STIPULATION

1. It might be either ourselves or H & A.
2. a. Yes.
b. Yes.
3. By either Macleod & Company, Inc. accepting a bid from H & A or H & A accepting an offer from Macleod & Company, Inc.
4. Yes.
5. By us.
6. Yes.
7. We are Agents for the International Harvester Co. of Philippines in most cases. If we are acting as their Agent, it is so noted on the contract. The language used is:
"Sold by International Harvester Co. of Philippines by Macleod & Company, Inc., Agents".
8. In the Philippine Islands.
9. International Harvester Co. of Philippines.
10. When the contract is shipped we are immediately notified by the International Harvester Company of Philippines and we in turn pass the information on to the buyer that his contract is being shipped on such and such a steamer.
11. (A) The Bill of Lading is made out in the name of Macleod & Company, Inc., but the invoice from the International Harvester Co. of Philippines is marked for the account of H. & A.
(B) 1. No.
2. Yes.
3. To us.
4. No. Inter-office transfers.
5. No.
6. None.
12. Macleod & Company, Inc.
13. Macleod & Company, Inc. under instructions from H & A, Xenia, Ohio.

14. H & A.

15. Straight Bill of Lading.

16. No.

17. Yes, but diversion would not take place without first obtaining permission from H & A.

18. (A) No.

(B) No.

(C) No.

(D) Yes.

(E) Yes.

[fol. 96] 19. (A) To enable the mills to make arrangements for receiving the goods on arrival and to act as notification of partial fulfillment of contract.

(B) Yes.

(C) Shipments are sometimes delayed after unloading and a number of Hemp sellers are working on Letters of Credit and it is essential that Draft due are taken up. The purpose of the Pro-forma is to obtain, in advance, some 90% of the value of the hemp to meet Drafts falling due.

20. The invoice is the final statement based on actual weights.

(A) It informs the seller the exact amount due on the value of the contract.

21. International Harvester Co. of Philippines.

22. H & A as the price includes the insurance.

23. International Harvester Co. of Philippines or Macleod & Company, Inc. whosever's interest is concerned.

24. International Harvester Co. of Philippines for the account of H & A.

(A) H & A.

(B) H & A.

25. H & A.

26. Yes, standard form of contract provides as outlined but is waived in the case of H & A and H & A pay for the

goods on receipt of invoice after delivery to H & A at Xenia, Ohio.

27. (a) Yes, but rarely if ever used.

(b) In case of unusual delay in the P. I. resulting in inability of seller to fulfill contract on time, advantage is taken of delivery of goods from store, if such goods are available in store.

28. By prior arrangement.

29. No.

30. It is our belief that H & A are the direct Importers of these goods and that we are merely an Intermediary of our principals in Manila to effect the business in the United States. For securing this business, we are paid a fixed commission on every sale made by the International Harvester Co. of Philippines which commission pays the overhead costs of our office. We make no profit on such sales other than our commission.

31. Contract enclosed.

(Here follows 1 photolithograph, side folio 97)

MACLEOD & COMPANY, INC.

No. _____

NEW YORK, 60 Beaver St.
CHICAGO, 180 North Michigan Ave.

Date _____

1. MACLEOD & COMPANY, INC.

have sold,

2.

have bought,

3. QUANTITY (5% more or less) 4. PRODUCT

5. PRICE PER POUND (U. S. Currency)

The price (or prices) is per pound landed on dock at destination, and is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. TERMS: Net cash. Payment in New York or Chicago funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.

7. SHIPMENT

Direct or indirect, with or without transshipment for the Port of sound and in good order and to be taken by buyers as discharged.

herein called destination. The goods to be shipped

8. Equivalent delivery from ship or store at seller's option.

9. WEIGHTS: Actual landed weights, less tare of four pounds per bale.

10. If before shipment of all the goods hereunder, the rates of ocean freight to port of arrival are increased by reason of the cancellation, suspension or change of tariff as the result of the imminence of war, or of war, or of governmental measures or interference, such increase in ocean freight rates shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, ocean freight rates shall decline, the buyer is to receive the benefit thereof.
(The rate of ocean freight at the date of this contract is _____ U. S. Currency per bale.)

10a. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. QUALITY: If inferior as to grade, buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five (45) days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the date of this contract for fibres in similar position. Damaged goods, if any, to be taken by buyer at a fair allowance.

12. DEVIATION: In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expenses incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding fifteen (15) days from date of final discharge of vessel.

15. WAR RISK INSURANCE: For buyer's account.

16. Any wharfrage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.

17. DELAY: Seller is not liable for delay or failure in shipments due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five (5) days after receipt of such notice, shall notify seller in writing whether buyer elects (1) to make shipment thereof as soon as seller shall be able to ship, or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be deemed to have elected (1) to make shipment thereof. Cancellation of shipment of such delayed delivery as

The price (or prices) is per pound landed on dock at destination, and is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. **TERMS:** Net cash. Payment in New York or Chicago funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. **SHIPMENT**
Direct or indirect, with or without transshipment for the Port of sound and in good order and to be taken by buyers as discharged, herein called destination. The goods to be shipped
8. Equivalent delivery from ship or store at seller's option.
9. **WEIGHTS:** Actual landed weights, less tare of four pounds per bale.
10. If before shipment of all the goods hereunder, the rates of ocean freight to port of arrival are increased by reason of the cancellation, suspension or change of tariff as the result of the imminence of war, or of war, or of governmental measures or interference, such increase in ocean freight rates shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, ocean freight rates shall decline, the buyer is to receive the benefit thereof.
(The rate of ocean freight at the date of this contract is U. S. Currency per bale.)
- 10a. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.
11. **QUALITY:** If inferior as to grade, buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five (45) days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the date of this contract for fibres in similar position. Damaged goods, if any, to be taken by buyer at a fair allowance.
12. **DEVIATION:** In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expenses incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding fifteen (15) days from date of final discharge of vessel.
15. **WAR RISK INSURANCE:** For buyer's account.
16. Any wharfrage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. **DELAY:** Seller is not liable for delay or failure in shipments due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery"), within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five (5) days after receipt of such notice, shall notify seller in writing whether buyer elects (1) to make shipment thereof as soon as seller shall be able to ship, or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign governments, whether made prior or subsequent to the making of this contract.
19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven (7) days after receiving the other party's nomination of arbitrator, the other arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the loss to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the loss are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

ACCEPTED:

MACLEOD & COMPANY, INC.

[fol. 98]

EXHIBIT "D" TO STIPULATION

September 17, 1941.

REPLIES TO QUESTIONNAIRE OF THOMAS C. LAWERY IN CONNECTION WITH OUR METHODS OF DOING BUSINESS WITH HOOVEN & ALLISON COMPANY, XENIA, OHIO

Preliminary negotiations are initiated either by ourselves or by Hooven & Allison Company, in other words we continually make them offers but at times when they are ready to buy they ask us what we have to offer. When we have offers firm in hand from our principals Handelsvereeniging "Amsterdam" Sourabaya we can offer them immediately, otherwise we have to cable their inquiry and obtain a definite offer for them. If they decide to buy at the price quoted they accept our offer and we in turn cable their acceptance to our principals. Sometimes they make us a bid which we submit to our principals in Java by cable, which is either accepted by them, or they may make a counter offer. If they accept the bid we in turn confirm the business to Hooven & Allison. If they make a counter offer we put same before Hooven & Allison for their consideration. If Hooven & Allison accept the counter offer the order is cabled by us to our principals.

After closing the business as above, by telephone or telegraph, we prepare the contract, which is the standard form of Sisal contract, with the changes referred to later on. The contract is made in duplicate and signed by us and these are sent to Hooven & Allison, who sign one copy and return same to us retaining the other copy for their files. A letter confirming the business usually accompanies the contract.

We definitely act as our principal's Selling Representative, and this is borne out by the fact that we offer and sell at the same price quoted by our principals and receive a fixed commission from them. Up to about a year ago the contract was made between Stein Hall & Company, Inc. and Hooven & Allison Company, both as principals, but since then we have been indicating on our contract "Sold by Stein Hall & Co., Inc. for account of Handelsvereeniging "Amsterdam", Sourabaya".

At the time the contract is entered into, the goods constituting its subject matter, are actually located in the Netherlands East Indies. As a matter of fact, oftentimes we make

sales for shipment many months later, and in that case the fiber probably has not even been produced. Our principals are growers of Sisal and Sumatra Abaca, and it has been their policy to sell for future shipment. Our Principals, Handelsvereeniging "Amsterdam", Sourabaya pay us our commission as above stated.

We are notified of the execution of the contract first by cable advice from our principals and then by mail confirmation, with their contract covering the particular sale. When the fiber is ready and packed, each bale bears a number which corresponds with a series of numbers stipulated on the ocean bill of lading and their invoice to us, thereby identifying each shipment and tying it up with the respective contract. When the goods are loaded in the vessel for shipment to the United States they are consigned on the bill of lading to a bank in the United States, notify our representative at the port of destination, i. e. one of our branches or if there is no branch at such port, then our Custom House brokers. The bills of lading also state in case of need notify Stein Hall & Co., Inc.

[fol. 99] The documents covering the shipment are sent to a bank in New York and we take delivery of said documents shortly before arrival of the vessel at the port of destination against payment by us to the bank of the value thereof.

When the goods arrive at the American port of destination, our Custom House broker clears them through the Customs in our name and arranges the forwarding of the goods to Hooven & Allison at Xenia, in accordance with the latter's instructions. We pay the cost of entry but the freight from the port of entry to Xenia is paid by Hooven & Allison. The goods are shipped from the port of entry to Xenia on a straight bill of lading and once such shipment is made, we of course do not reserve any power of disposition over the goods. The ocean bill of lading, as above explained, is made to the order of the bank for obvious financing reasons and therefore either the bank or the bona fide holder of the bill of lading have control over the goods until said goods are released by the Steamship Company upon presentation of the Bill of Lading.

The standard form of Sisal contract is a landed contract, but as you will note from the terms and conditions of the contract, the goods are entirely at the risk of the buyer

from the time they are loaded on to the vessel at port of shipment, and subsequent delivery to the buyer is contingent upon the safe and sound arrival of the goods. In the event of a catastrophe or loss of the goods while on the high seas, we are not liable for replacement. Therefore this contract is really equivalent to a c. i. f. contract except that as an accommodation to our buyers who do not have the facilities for clearance through the U. S. Customs, attending to Insurance and other claims if any weighing, forwarding, etc., we act as their representatives in performing these necessary functions. Hence this is the only reason why the Standard Sisal contract is a landed contract. In our case, since August 1940 we have been selling Hooven & Allison on this form of contract, but c. i. f. U. S. port of destination. We have stricken out the words "landed at the port of destination" and substituted "C. I. F.". Lately we have also stricken out the words "title to remain in seller until goods are fully paid for", in Clause #6. The actual procedure of clearing the goods through the Customs and forwarding them to Xenia remains the same as described above.

Although the terms of the contract specify "Payment in New York funds on delivery on dock at destination", in actual practice the goods are shipped to Hooven & Allison, Xenia, and they pay us some time afterwards, the period averaging from ten to fifteen days after presentation of our invoice. When the shipment of fiber arrives at the port of destination it is weighed, inasmuch as the sale is made on the basis of landed weights. In the meantime we send a pro forma invoice to Hooven & Allison based upon approximate weights. When the goods are weighed a final invoice giving actual weights as per public weighers certificates and based thereon, is sent to Hooven & Allison and this is the invoice which is actually passed for payment.

When shipment is made by our principals from the Netherlands East Indies, they cable us a declaration, that is advice that shipment of such and such a contract has been made, and we in turn make formal declaration to our buyer, in this case Hooven & Allison. This declaration actually serves to appropriate such lot of goods on the particular steamer for Hooven & Allison. The marine and war risk insurance are covered under our principal's open policy with American underwriters and we attend to all the details connected therewith. The beneficiary of this policy

is Handelsvereeniging "Amsterdam", Sourabaya, and/or [fol. 100] Stein Hall & Company, Inc. or order, or to Banks or Bankers as their interest may appear. The cost of the marine insurance is included in the contract price and is paid for by our principals. The war risk insurance premium is charged to Hooven & Allison as according to the terms of the contract, this is for their account. The increased value insurance is also placed by us under our principal's open policy and the premium therefor is charged to Hooven & Allison on our invoice. Should a loss occur, the difference between the contract price and the increased value price at which the goods are insured, is paid to Hooven & Allison after the claim is collected from the insurance underwriters.

According to available records there has never been a loss at sea of goods sold to Hooven & Allison by us.

All wharfage, port dues, tolls or other charges of a similar nature at the port of discharge, are for account of Hooven & Allison as covered by Clause #16 of the contract.

Clause #8 of the Standard Sisal contract reads "equivalent delivery from ship or store at seller's option", but this option has never been exercised by us, and as far as we are concerned, is superfluous as we do not carry stocks of Sisal and Abaca in this country but sell only for shipment from foreign origin.

In our opinion Hooven & Allison are definitely the importers of the goods sold by us as selling representatives of our foreign principals, Handelsvereeniging "Amsterdam", Sourabaya, producers of Sisal and Abaca in the Netherlands East Indies, in spite of the fact that the ocean bills of lading are not made out in the name of Hooven & Allison Company but are consigned to the order of a bank as above described. The fact that we or our Customs brokers attend to the Customs clearance and arrange for shipment from the port of destination to Xenia, does not, in our opinion, alter our position as we act merely as forwarding agents, and as an accommodation to our buyers.

It would seem from all of the above that the fact is well established that the goods are earmarked at the originating point of shipment for Hooven & Allison Company, and that they are therefore entirely as their risk and for their account. The services that we perform in granting credit, entering the goods through Customs and arranging for forwarding to Xenia from the port of destination, attending

to insurance and other claims, if any, are in the nature of a service to Hooven & Allison to compensate them for placing their business with us instead of sending direct cables to the shippers in the Netherlands East Indies, and thus being burdened with a great deal of foreign trade technique with which they are not familiar and not equipped to handle.

We are enclosing herewith as requested, a copy of the standard form of contract used by us at present in our dealings with Hooven & Allison. We have made the changes therein above referred to.

Stein, Hall & Company, Inc. (Signed) M. S. Rosenthal, Vice President.

Sworn to before me this 20th day of September, 1941,
Cornelius P. Coughlan, N. P., Westchester County,
N. Y. Co. Clks. No. 459, Reg. No. 30300, Commission Expires March 30, 1943.

(Here follows 1 photolithograph, side folio 101)

STANDARD TELEPHONE & CABLE CO., INC.

285 Madison Avenue

New York

SISAL CONTRACT

NEW YORK.

1. SOLD BY:
2. TO:
3. QUANTITY: About (5% more or less)
4. PRODUCT: C.I.F.
5. PRICE: cent. U. S. Currency per pound ~~XXXXXXXXXXXXXXXXXXXX~~ This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. TERMS: Payment in New York funds on delivery on dock at destination. ~~XXXXXXXXXXXXXXXXXXXX~~
7. SHIPMENT:
Direct or indirect, with or without trans-shipment for the port of herein called destination.
The goods to be shipped sound and in good order and to be taken by buyers as discharged.
8. Equivalent delivery: from ship or store at seller's option.
9. WEIGHTS:
10. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.
b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.
11. Quality: If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold, before or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damaged, if any, to be taken by buyer at a fair allowance.
12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses, shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. War risk insurance:
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods, (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obligated to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Govern-

sub. to cancell

6. TERMS: Payment in New York funds on delivery on dock at destination. ~~TERMS: Payment in New York funds on delivery on dock at destination.~~

7. SHIPMENT:

Direct or indirect, with or without trans-shipment for the port of _____, herein called destination.
The goods to be shipped sound and in good order and to be taken by buyers as discharged.

8. Equivalent delivery from ship or store at seller's option.

9. WEIGHTS:

10a. In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyers to receive the benefit thereof.

b. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. Quality:

buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damaged, if any, to be taken by buyer at a fair allowance. If inferior thereto

12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

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18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.

19. Arbitration: Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered, said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

ACCEPTED:—

STEIN, HALL & COMPANY, INC.

Buyer

Seller

[fol. 102] EXHIBIT "C" TO STIPULATION

James Fyfe, Flax-Hemp-Sisal-Jute, 44 Whitehall Street,
New York

September 15th, 1941.

Mr. Thomas C. Lavery, Campus Station, Cincinnati, Ohio.

DEAR MR. LAVERY:

Your favor of 13th inst. received together with questionnaire in connection with Hooven & Allison business and the following are my answers:—

1. Preliminary negotiations may be entered into by either Messrs. Hooven & Allison Co. or myself depending on circumstances. For instance, they may be interested to buy and phone requesting what I have to offer. On the other hand, I send out my offerings from time to time and the Hooven & Allison Co. may see something which they might desire to purchase and phone me.

2. This is answered by my answer to #1.

3. This is also answered by my reply to #1.

4. The answer is yes.

5. The contract is prepared by me.

6. The answer is yes.

7. I do act as agent for foreign sellers and the contract indicates on its face that I am acting as agent. The contract reads—"I have this day sold to you as Agent for Messrs. —"

8. The goods are always in a foreign country.

9. My commission is paid by my foreign principal.

10. When the material is shipped, my foreign principal cables giving the name of the steamer and I in turn pass it on to Messrs. Hooven & Allison.

11. Naturally, if the foreign principal cables stating that the goods have been shipped for Messrs. Hooven & Allison on a certain steamer, they are then definitely earmarked for Hooven & Allison and secondly, my foreign principal naturally consigns the goods to me, as his agent. As regards

the method of paying my foreign shipper, in most cases, the goods are sent to me free but I am responsible to collect the proceeds from Messrs. Hooven & Allison and remit to my principal less my commission. Messrs. Hooven & Allison do not furnish a Letter of Credit to a New York bank. Further, the material is not sold to Hooven & Allison on a C.i.f. basis. It is sold on the Standard Form of Contract of the trade which is a Landed contract.

[fol. 103] 12. On arrival of the goods at an American port, they are cleared through the customs by me.

13. This office arranges transshipment of the goods from port of arrival to Xenia, Ohio.

14. The cost of the above service is paid by Messrs. Hooven & Allison as it is included in the contract price.

15. Goods are forwarded by me from port of arrival on a straight bill of lading consigned to Messrs. Hooven & Allison Co., Xenia, Ohio.

16. The seller does not reserve any power of disposition of the goods either in the marine bill of lading or in the railroad bill of lading for the simple reason that Messrs. Hooven & Allison Co. are the importers.

17. The seller could not divert the shipment at any time if the goods are loaded on board ship for the simple reason that they are already shipped for Messrs. Hooven & Allison under a specified contract.

18. The Standard Form of Contract requires Messrs. Hooven & Allison to pay for the goods after arrival and inspection at Xenia, Ohio. The sale is, therefore, a credit sale based on the good name of the Company.

19. The cable declaration of shipment which is received by the importer is immediately passed on to Messrs. Hooven & Allison and, therefore, puts them in a position to know when they may expect arrival of the goods. When the declaration is made, it bears a definite contract number and date and, therefore, serves to indicate the fulfillment of the contract in due course. On arrival of the goods at port of entry, a pro forma invoice is generally sent to the buyers. This is a custom of the trade that the goods have arrived in a U. S. port.

20. A final invoice is sent to the buyer after the material has been weighed at port of entry and payment is expected after arrival of the goods at interior destination which in this case, is Xenia, Ohio.

21. The agent in New York generally insures the goods against both marine and war risk and also for increased value, if the buyer so desires.

22. The marine insurance is paid by the seller whereas the war risk insurance is paid by the buyer except in specified instances for certain fibres where the seller assumes up to one-half of 1% of the war risk premium.

23. The beneficiary of the marine and war risk policies is the shipper for the simple reason that until the goods are delivered in Xenia, Ohio, they are not paid for by Messrs. Hooven & Allison.

[fol. 104] 24. As already mentioned, increased value insurance is only placed by the seller or his agent at the request of the buyer. However, war risk insurance is always placed by the seller or his agent and the Standard Form of Contract stipulates that the buyer must pay the war risk insurance in addition to the contract price. The premium for increased value insurance is also paid for by the buyer and in this case, the buyer is the beneficiary.

25. Wharfage, port dues, toll or other charges of a similar nature at port of discharge are always for the buyer's account in conformity with the Standard Form of Contract.

26. The Standard Form of Contract does provide for payment in New York funds on delivery on dock at destination but this does not apply to sales to Messrs. Hooven & Allison and to my other mills who are allowed to pay after arrival and inspection of the goods at their mill. The Standard Form of Contract also provides that title is to remain in seller until goods are fully paid for but this does not apply to sales to Messrs. Hooven & Allison.

27. The Standard Form of Contract provides for equivalent delivery from ship or store at seller's option but in no case, have I ever delivered to Messrs. Hooven & Allison from store. This clause in the contract is a formal clause which has been used for many years as a safeguard to the seller.

28. Where the terms of the contract in the course of business under it are inconsistent, special arrangements can always be made between buyer and seller to meet such a contingency.

29. Up to the present time, I have had the good fortune of not losing any goods at sea which I have sold to Messrs. Hooven & Allison.

30. As agent for my various foreign principals and in my business dealings with Messrs. Hooven & Allison, I have always naturally considered them as the importers for the simple reason that my contracts with them and with many others show that—"I have this day sold to you on account of Messrs. —, the following:—". It is, therefore, clear that Messrs. Hooven & Allison are the direct importers of the goods from my foreign principals, although, handled by me in New York City as agent.

I certify that the foregoing answers to your questionnaire have been answered to the best of my ability.

Yours very truly, (Signed) James Eyfe.

Sworn to this 16th day of Sept., 1941. (Signed) Anthony Romano, Notary Public, Queens Co., No. 1842, Certificate filed in N. Y. Co. No. 140, Commission Expires March 30, 1942.

JF:RH

(Here follows 1 photolithograph, side folios 105-108)

STANDARD FORM MANILA HEMP CONTRACT, AS AGREED
TO BY MANILA CHAMBER OF COMMERCE

JAMES FYFE

No.

Flax — Hemp — Jute
Sisal

44 Whitehall St.
New York

1. SOLD BY:

2. TO:

3. QUANTITY: About

(5% more or less)

4. PRODUCT:

5. PRICE:

cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. TERMS: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.

7. SHIPMENT:

Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyers as discharged.

herein called destination.

8. Equivalent delivery from ship or store at seller's option.

9. WEIGHTS: Actual certified weight less four pounds per bale tare.

10A. If before shipment of all the goods hereunder the rates of ocean freight to port of arrival are increased by reason of the cancellation, suspension or change of tariff as the result of the imminence of war, or of war, or of governmental measures or interference, such increase in ocean freight rates shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, ocean freight rates shall decline, the buyer is to receive the benefit thereof.
(The rate of ocean freight at the date of this contract is U. S. Currency per bale.)

B. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. QUALITY: If inferior thereto
buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold, afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the date of this contract for hemp in similar positions. Damaged, if any, to be taken by buyer at a fair allowance.

12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.

15. WAR RISK INSURANCE: Entire premium for buyer's account.

16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.

17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods, (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obligated to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.

18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.

19. ARBITRATION: Any dispute arising out of this contract or its interpretation shall be settled by arbitration in

5. **PRICE:** cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. **TERMS:** Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. **SHIPMENT:**

Direct or indirect, with or without trans-shipment for the port of _____ herein called destination.
The goods to be shipped sound and in good order and to be taken by buyers as discharged.

8. Equivalent delivery from ship or store at seller's option.

9. **WEIGHTS:** Actual certified weight less four pounds per bale tare.

- 10A. If before shipment of all the goods hereunder the rates of ocean freight to port of arrival are increased by reason of the cancellation, suspension or change of tariff as the result of the imminence of war, or of war, or of governmental measures or interference, such increase in ocean freight rates shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, ocean freight rates shall decline, the buyer is to receive the benefit thereof.
(The rate of ocean freight at the date of this contract is _____ U. S. Currency per bale.)

- B. Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. **QUALITY:** If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the date of this contract for hemp in similar positions. Damaged, if any, to be taken by buyer at a fair allowance.

12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above threat freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.

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17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obligated to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.

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19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is advanced more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, County or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

ACCEPTED:—

JAMES FYFE

Flax — Hemp — Jute

Sisal

No. .

44 Whitehall St.
New York

1. SOLD BY:

2. TO:

3. QUANTITY: About

(5% more or less)

4. PRODUCT:

5. PRICE:

cents, U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax of charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. TERMS: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.

7. SHIPMENT:

Direct or indirect, with or without transshipment for the port of . . . herein called destination.
The goods to be shipped sound and in good order and to be taken by buyers as discharged.

8. Equivalent delivery from ship or store at seller's option.

9. WEIGHTS:

10. A—In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof. This contract based on ocean freight of

B—Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

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18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

FIBRE CONTRACT

JAMES FYFE
Flax — Hemp — Jute
Sisal
—

No.
44 Whitehall St.
New York

1. SOLD BY:

2. TO:

3. QUANTITY: About

(5% more or less)

4. PRODUCT:

5. PRICE: cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

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Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyers as discharged.

herein called destination.

8. Equivalent delivery from ship or store at seller's option.

9. WARRANTIES:

10. A—In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof. This contract based on ocean freight of

B—Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. QUALITY: buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within thirty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damaged, if any, to be taken by buyer at a fair allowance.

12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.

15. WAR RISK INSURANCE: Any premium in excess of one-half of one per cent to be for buyer's account.

16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.

17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, (hereinafter called "contingency beyond seller's control") within the time specified,

5. **PRICE:** cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. **TERMS:** Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. **SUMMARY:**

Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyers as discharged.

herein called destination.

8. **Equivalent delivery from ship or store at seller's option.**

9. **WEIGHTS:**

10. **A—**In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof. This contract based on ocean freight of

B—Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of such transportation will be for buyer's account.

11. **QUALITY:** If inferior thereto
buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within thirty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damaged, if any, to be taken by buyer at a fair allowance.
12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expenses incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. **WAR RISK INSURANCE:** Any premium in excess of one-half of one per cent to be for buyer's account.
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not. If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for sixty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obligated to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

JUTE CONTRACT

JAMES FYFE

Flax — Hemp — Jute

Sisal
—

No.

**44 Whitehall Street
New York**

I have this day

About

Bales (5% more or less)

The goods to be shipped sound and in good order and to be taken by buyers as discharged

SHIPMENT:—

INSURANCE:—

PAYMENT:—

ALL OTHER TERMS AND CONDITIONS to be strictly in accordance with the London Jute Association Current Contract and the New York Burlap and Jute Association Contract.

[fol. 109]

Copy

EXHIBIT "E" TO STIPULATION

Business between Messrs. Hooven & Allison Company and ourselves is sometimes initiated by us and sometimes by them. We frequently make offers to Hooven & Allison, both direct and through New York brokers. At times Messrs. Hooven & Allison advise us that they are interested in certain grades of fibre and ask us to get offers for them, or even make us bids to cable to our principals abroad. Actual business results if a bid made by Hooven & Allison is accepted by our foreign principals or if some of our offers to Hooven & Allison are accepted by them.

On the closing of business we draw up a contract which is signed by us and then sent to Messrs. Hooven & Allison for their signature. In the case of business transacted through New York brokers, the contract is drawn up by these brokers. A standard form of contract is used. In all cases signed copies are exchanged so that both buyer and seller have a signed copy for their files.

In these sales we act as agent for a foreign seller. The contract clearly shows this, for it is worded "sold by Hanson & Orth, agents for" or "sold by Hanson & Orth for account of". For acting as selling agents our foreign principals pay us a commission. At the time the goods are sold they are still located in some foreign country. We immediately notify the foreign seller by cable. In cabling the sales we allot a number to each sale. The bales to be shipped against each sale are then marked by the foreign seller with a distinctive shipping mark so that at all times each sale can be readily identified. When the goods are shipped from country of origin, the shippers send us a cable, advising us that certain sale numbers have been shipped by such and such a steamer. The practice varies in regard to drafts and documents. We represent several different sellers in several different countries, and their shipping arrangements differ somewhat. In some cases drafts accompany the bills of lading; in others, they do not. Most bills of lading are drawn to "order, notify Hanson & Orth". Some are made up in the name of our forwarding agents at outports where we have no office of our own. We have not made any sales to Messrs. Hooven & Allison on a C. I. F. basis, nor do they furnish letters of credit on New York banks.

On arrival in this country we clear the goods through the Customs; sometimes ourselves, or sometimes through our weighers and forwarders. Any cost for this service is included in the price paid by the buyers. The goods are then shipped to Messrs. Hooven & Allison Company in Xenia on a straight bill of lading. On neither the marine bill of lading nor the railroad bill of lading does the seller reserve any power of disposition over the goods, and the seller could not divert the shipment after the goods are loaded on ship, for at that time the shipment is declared to Hooven & Allison.

The contract calls for payment "on delivery on dock at destination". As a matter of practice the fibre is shipped to Xenia without waiting for any payment. Invoices are then rendered and payment is received shortly thereafter. To the extent that the fibre is shipped to the buyer on a straight bill of lading without payment, the sale is in effect a credit sale.

[fol. 110] I already mentioned the cabled declaration which we receive from our foreign shippers when shipment is effected. Immediately on receipt of this advice from abroad, we forward a declaration to Messrs. Hooven & Allison, which serves the purpose of informing them that the fibre in question has been shipped. With this knowledge they can then calculate the approximate arrival date at their mill. This declaration of course indicates the contract against which the goods have been shipped. In due course a proforma invoice is rendered to the buyers. This is sent to enable the buyers to know the approximate value of the shipment in question and to permit them to make a payment on account. The final invoice cannot be rendered until after the fibre has been weighed and we have received weight returns from our public weighers. After these details have been received, we render a final invoice, which leads to the complete settlement of the transaction.

The seller insures the goods against loss during transit and pays the premium for this insurance, although of course he passes this along to the buyer by including it in the sale price. The seller is the beneficiary of the insurance policy because if the goods were to be lost at sea, it would be before the buyer is called upon to make a payment. Increased value insurance and war risk insurance are both arranged for by the seller, although the premiums for both these forms of insurance are charged to the buyer in the

final invoice. The increased value insurance is for the benefit of the buyer, whereas the war risk insurance is for the benefit of the seller.

The contract provides that any wharfage; port dues, toll, or other charges of a similar nature at the port of discharge are for buyer's account.

Most of our sales to Hooven & Allison are covered by contracts which include the clause "payment in New York funds on delivery on dock at destination, title to remain in seller until goods are fully paid for". However, in some contracts the words "title to remain in seller until the goods are fully paid for" has been omitted.

The standard form of contract provides for "equivalent delivery from ship to store at seller's option", but we have never exercised this option in the case of sales made to Messrs. Hooven & Allison.

I believe that the terms of the contract and the course of business transacted under it are entirely consistent, with the single exception that in the case of sales to Messrs. Hooven & Allison we do not insist on payment on delivery on dock. In the case of certain other buyers we do insist on payment exactly as called for in the contract, but in dealing with a firm of such high standing as Hooven & Allison, this technicality is waived.

I do not recall any case of a complete loss of fibre at sea on any sale to Hooven & Allison. Some months ago some Java Sisal sold to these friends, while not actually lost, was so badly damaged that it was considered a total loss and abandoned to underwriters.

[fol. 111] Viewing the entire course of these business transactions, in my opinion Hooven & Allison should be considered as the real importer, for I believe that the fundamental consideration is the fact that certain identifiable parcels of fibre are shipped from foreign countries specifically for Hooven & Allison and brought into this country on their orders and for their use.

(Signed) William Knight.

Sworn to before me this 16 day of Sept. 1941, (Signed)
Mary E. Murphy, Notary Public, Kings Co. No.
513, Certificate filed in N. Y. Co. No. 283. Com-
mission expires March 30, 1943.

(Here follow 2 photolithographs, side folios 112-113.)

NEW YORK

SISAL CONTRACT

No.

New York,

1. Sold by:

SISAL CONTRACT

No.

New York,

1. Sold by:
2. To:
3. Quantity: About
4. Product:
5. Price:

(5% more or less)

cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. Terms: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. Shipment:

Direct or indirect, with or without trans-shipment for the port of herein called destination. The goods to be shipped sound and in good order and to be taken by buyer as discharged.

8. Equivalent delivery from ship or store at seller's option.

9. Weights:

10. (a) In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.

(b) Where the price includes the cost of transportation from port of arrival to an interior point, any change in the cost of said transportation will be for buyer's account.

11. Quality: To be guaranteed as above. If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damaged, if any, to be taken by buyer at a fair allowance.

12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.

15. War risk insurance:

16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.

17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.

If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.

Direct or indirect, with or without trans-shipment for the port of herein called destination. The goods to be shipped sound and in good order and to be taken by buyer as discharged.

8. Equivalent delivery from ship or store at seller's option.
9. Weights:
10. (a) In the event that carriers cancel or suspend their contracts of affreightment or change their tariffs due to war or imminent danger of war or Governmental measures or interference, any change in the cost of ocean transportation affecting these goods will be for buyer's account. If, as a result of and due to (a) termination of a period of imminent danger of war, or (b) termination of war, or (c) Governmental measures or interference, the cost of ocean transportation affecting these goods decreases, the buyer is to receive the benefit thereof.
(b) Where the price includes the cost of transportation from port of arrival to an interior point any change in the cost of said transportation will be for buyer's account.
11. Quality: To be guaranteed as above. If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of arrival. Damaged, if any, to be taken by buyer at a fair allowance.
12. In the event that the carrier, for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of final discharge of vessel.
15. War risk insurance:
16. Any wharfage, port dues, toll or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.
If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. Arbitration: Any dispute arising out of this contract or its interpretation shall be settled by arbitration in _____ in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

HANSON & ORTH
NEW YORK

MANILA HEMP CONTRACT

NO.

NEW YORK.

1. SOLD BY:

2. TO:

3. QUANTITY: About

(5% more or less)

4. PRODUCT:

5. PRICE:

cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.

6. TERMS: Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.

7. SHIPMENT:

Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyer as discharged

herein called destination.

8. Equivalent delivery from ship or store at seller's option.

9. WEIGHTS: To be taken as landed from steamer, less four pounds per bale tare.

10. (a) If before shipment of all the goods hereunder the rates of freight to point of destination are increased by reason of the cancellation, suspension or change of tariff as a result of, the imminence of war, or of war, or of governmental measures or interference, such increase in freight rate shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, freight rates shall decline, the buyer is to receive the benefit thereof.

The rate of ocean freight at the date of this contract is _____

(b) Where the price includes the cost of transportation from port of arrival to an interior point any change in the cost of said transportation will be for buyer's account.

11. QUALITY: To be guaranteed as above. If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of this contract for fibres in similar positions. Damaged, if any, to be taken by buyer at a fair allowance.

12. In the event that the carrier for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.

13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or damaged by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.

14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of discharge of vessel.

15. Any premiums for war risk insurance to be for buyer's account.

16. Any wharfrage, port dues or other charges of a similar nature at the port of discharge to be for buyer's account.

17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.
If called because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter

5. **PRICE:** cents U. S. Currency per pound landed on dock at destination. This price is based upon the present import duty (duty free); any change whether in rate, classification, or in the basis or method of assessing same, or any excise or other tax or charge, United States, State or Municipal, imposed on the product covered hereby, or any change therein, shall be for the buyer's account.
6. **TERMS:** Payment in New York Funds on delivery on dock at destination. Title to remain in seller until goods are fully paid for.
7. **SHIPMENT:**

Direct or indirect, with or without trans-shipment for the port of
The goods to be shipped sound and in good order and to be taken by buyer as discharged.

herein called destination.

8. **Equivalent delivery** from ship or store at seller's option.
9. **WEIGHTS:** To be taken as landed from steamer, less four pounds per bale tare.
10. (a) If before shipment of all the goods hereunder the rates of freight to point of destination are increased by reason of the cancellation, suspension or change of tariff as a result of, the imminence of war, or of war, or of governmental measures or interference, such increase in freight rate shall be for the account of the buyer. If for any reason during the life of this contract, but before shipment of all the goods hereunder, freight rates shall decline, the buyer is to receive the benefit thereof.
The rate of ocean freight at the date of this contract is _____
- (b) Where the price includes the cost of transportation from port of arrival to an interior point any change in the cost of said transportation will be for the buyer's account.
11. **QUALITY:** To be guaranteed as above. If inferior thereto buyers are to take the goods at a fair allowance. Any claim on account of quality or condition of goods sold afloat or for shipment must be made within forty-five days after arrival of vessel at destination. The market difference for various grades is to be taken as existing at the time of this contract for fibres in similar positions. Damaged, if any, to be taken by buyer at a fair allowance.
12. In the event that the carrier for reasons beyond its control, in accordance with its bill of lading, discharges the goods at a place other than destination, any and all expense incident to transporting the goods to destination, over and above direct freight charges from original port of shipment to above destination, shall be for buyer's account. Any refund or absorption by the carrier of any such charges or expenses shall accrue to the benefit of the buyer.
13. In the case of loss after shipment, or acceptance of abandonment by the insurance underwriters, of all or any portion of the goods, such portion to be excluded from contract and the quantity reduced accordingly, but buyer is bound to accept goods delayed on voyage or arriving by carrier other than that by which originally shipped. This also applies to goods substituted under the equivalent delivery clause.
14. Seller to hold the goods covered under the terms of his marine insurance policy while on dock for a period not exceeding 15 days from date of discharge of vessel.
15. Any premiums for war risk insurance to be for buyer's account.
16. Any wharfage, port dues or other charges of a similar nature at the port of discharge to be for buyer's account.
17. Seller is not responsible for any liability for delay or failure in shipment due to any contingencies whatsoever beyond seller's control, whether now in contemplation of either of the parties hereto or not.
If seller, because of any contingency beyond seller's control, shall be unable to ship all or any portion of the goods (hereinafter referred to as the "delayed delivery") within the time specified, the time for shipment of such delayed delivery shall automatically be extended for thirty days; if seller shall not ship such delayed delivery within said extended period, seller shall give notice to buyer and buyer within five days after receipt of such notice shall notify seller in writing whether buyer elects (1) to take shipment thereof as soon as seller shall be able to ship or (2) cancel shipment thereof. If buyer shall fail to give notice within said time, buyer shall be obliged to take shipment of such delayed delivery as soon as seller shall be able to ship. Cancellation of shipment of such delayed delivery, as aforesaid, shall not affect the rights of the parties with respect to the balance, if any, of the goods covered by this contract.
18. Performance under this contract is subject to all laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (Civil or Military) of the United States and any foreign Governments, whether made prior or subsequent to the making of this contract.
19. **ARBITRATION:** Any dispute arising out of this contract or its interpretation shall be settled by arbitration in the customary manner, buyer and seller each naming their arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding on both parties. If either party fails to appoint an arbitrator within seven days after receiving the other party's nomination of arbitrator, the one arbitrator nominated may act as sole arbitrator. In case of alleged inferiority, the fees to be paid by the seller if the fibre is allowed more than the amount which said seller may have offered said buyer in settlement, otherwise the fees are to be paid by the buyer. Seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction.

[fol. 114]

APPELLANTS' EXHIBIT No. 2

Department of Taxation, Board of Tax Appeals

No. 4441

THE HOOVEN AND ALLISON COMPANY, Xenia, Ohio, Appellant,

v.

WILLIAM S. EVATT, Tax Commissioner, Columbus, Ohio,
Appellee

STIPULATION

It is agreed by and between counsel for the respective parties to this proceeding that the tangible personal property in appellant's inventory in the original packages in which such property was imported into the United States from countries other than the Philippine Islands and from the Philippine Islands during the taxable years 1938, 1939, and 1940, came from the sources and had the value herein set forth:

Year	Source	Value
1938	Countries other than the Philippine Islands	\$410,030
1938	Philippine Islands	57,500
1939	Countries other than the Philippine Islands	225,080
1939	Philippine Islands	49,750
1940	Countries other than the Philippine Islands	191,990
1940	Philippine Islands	29,800

Thomas C. Lavery, Attorney for Appellant; Aubrey
A. Wendt, Asst. Atty. Gen., Attorney for Appel-
lee

[fol. 115] IN THE SUPREME COURT OF OHIO

No. 29,531

THE HOOVEN & ALLISON COMPANY, a Corporation, Appellant,

v.

WILLIAM S. EVATT, Tax Commissioner of Ohio, Appellee

NOTICE OF APPEAL

Appellant, the Hooven & Allison Company, Xenia, Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the final entry of the Board of Tax Appeals of the Department of Taxation of Ohio, entered on the 19th day of March, 1943, as follows:

"No. 4441"

Before the Board of Tax Appeals, Department of Taxation
of Ohio

THE HOOVEN & ALLISON COMPANY, Xenia, Ohio, Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio, Appellee

ENTRY.

[fol. 116] This day this cause came on to be heard and was submitted upon the transcript of the proceedings before the Tax Commissioner, the stipulation of facts, the evidence and briefs.

The Board of Tax Appeals being fully advised in the premises finds that the appellant, a corporation, filed an intercounty tax return for each of the years 1938, 1939 and 1940. In each of said returns appellant omitted from its manufacturing inventory certain fibers produced in the Philippine Islands and in foreign countries claiming that said fibers were imports and not taxable by the State of Ohio. From its 1938 return appellant omitted fibers coming from the Philippine Islands of the value of \$57,500 and fibers coming from other countries of the value of \$410,030.00; from its 1939 return appellant omitted fibers coming from the Philippine Islands of the value of \$49,750.00 and fibers coming from other countries of the value of \$225,-

080.00; from its 1940 return appellant omitted fibers coming from the Philippine Islands of the value of \$29,800.00 and fibers coming from other countries of the value of \$191,990.00, said amounts representing the average value of said fibers held in appellant's inventory during the preceding years respectively. On July 3, 1941 the Tax Commissioner made amended assessments against appellant for said years increasing appellant's average inventory by the above amounts respectively. This appeal is from an order of the Tax Commissioner denying appellant's application for review and redetermination.

The Board further finds that said fibers were stored at appellant's manufacturing plant at Xenia, Ohio, in the original packages as a part of its manufacturing inventory and that they were purchased from New York firms acting as agents of the vendors and shippers of said goods under [fol. 117] written contracts signed by the agents and the appellant. Said contracts provide for delivery on dock at Baltimore, Maryland or other United States ports; for payment on delivery on dock at destination, title to remain in seller until goods are fully paid for; that in case of loss at sea, the portion of the goods so lost shall be excluded from the contract and the quantity reduced accordingly; that said goods were shipped by the seller to port of destination consigned to seller's agent and insured while at sea with loss payable to seller or seller's agent; and that on arrival they were cleared through port of entry and duties and other expenses, if any, were paid by seller's agent. Said goods were then reshipped by seller's agent to appellant at Xenia, Ohio.

The Board further finds that the fibers contained in appellant's inventory which came from the Philippine Islands did not come from a foreign country and were not imports within the meaning of Article I, Section 10 of the Constitution of the United States or under the provisions of the tariff act, 19 U. S. C. A. 1336.

The Board further finds that appellant is not the importer of the fibers which came from foreign countries as it did not acquire title until after said goods had been entered and delivered on dock at Baltimore, Maryland or other United States port and that said goods have lost their characteristics as imports and are taxable by the State of Ohio.

It is therefore ordered that the assessments heretofore made herein by the Tax Commissioner against appellant for

the years 1938, 1939 and 1940 be and the same hereby are respectively affirmed and that said appeal be and the same hereby is denied.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken, with respect to the above matter.

Harry J. Rose, Secretary." (Seal)

ASSIGNMENTS OF ERROR

The appellant avers that in the record and proceedings before the Board of Tax Appeals, Department of Taxation, State of Ohio, and in the final order entered by said board manifest error occurred and intervened to the prejudice of the appellant, who now assigns the following errors and each of them, which it avers occurred in said record, proceedings, opinion, and final entry of said Board:

The Board of Tax Appeals, Department of Taxation, State of Ohio, erred:

(1) in that it found that the fibers contained in appellant's inventory which came from the Philippine Islands did not come from a foreign country and were not imports within the meaning of Article I, Section 10, of the Constitution of the United States;

(2) in that it found that appellant was not the importer of the fibers contained in appellant's inventory which came from foreign countries within the meaning of Article I, Section 10, of the Constitution of the United States;

(3) in that it found that the fibers contained in appellant's inventory had lost their characteristics as imports, within the meaning of Article I, Section 10, of the Constitution of the United States, and had become taxable by the State of Ohio;

(4) in that it failed to find that the fibers contained in appellant's inventory which came from the Philippine Islands did come from a foreign country and were imports within the meaning of Article I, Section 10, of the Constitution of the United States;

(5) in that it failed to find that the appellant was the importer of the fibers which came from foreign countries

within the meaning of Article I, Section 10, of the Constitution of the United States;

(6) in that it failed to find that the fibers contained in appellant's inventory had retained their characteristics as imports within the meaning of Article I, Section 10, of the Constitution of the United States, and were immune from taxation by the State of Ohio;

(7) in that it affirmed the assessments heretofore made by the appellee, the Tax Commissioner of Ohio, against appellant for the years 1938, 1939, and 1940, in violation of Article I, Section 10, of the Constitution of the United States;

(8) in that it denied the appeal of the appellant from the assessments heretofore made by the appellee, the Tax Commissioner of Ohio, for the years 1938, 1939, and 1940, in violation of Article I, Section 10, of the Constitution of the United States;

(9) in that its final entry is not supported by the evidence and is contrary to the provisions of Article I, Section 10, of the Constitution of the United States;

(10) in that its entry is contrary to the evidence contained in the record and to facts set forth in its opinion, in violation of Article I, Section 10, of the Constitution of the United States;

(11) in that it committed errors not apparent of record or not disclosed to appellant.

[fol. 120] William S. Evatt, Tax Commissioner of the Department of Taxation of Ohio, is designated appellee herein.

Said appeal is on questions of law and fact.

The Hooven & Allison Company, by Its Attorneys,
Thomas C. Lavery, Marcus E. McCallister.

Acknowledgment

Receipt of a copy of the notice of appeal to the Supreme Court of Ohio in the above-entitled cause is hereby acknowledged on this 13th day of April, 1943.

William S. Evatt, Tax Commissioner.

Proof of Filing of Notice of Appeal With the Board of Tax Appeals

The undersigned hereby certifies that appellant, The Hooven & Allison Company, filed its notice of appeal in the

above-entitled cause with the Board of Tax Appeals of the Department of Taxation of the State of Ohio, on the 13th day of April, 1943, and filed a written demand requesting said Board to file with the Supreme Court a certified transcript of the record of the proceedings of said Board pertaining to the decision in the above-entitled cause.

Harry J. Rose, Secretary.

[fol. 121] CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 10, Clause 2, Constitution of the United States

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[fol. 122] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION OF OHIO

No. 4441

THE HOOVEN & ALLISON COMPANY, Xenia, Ohio, Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio, Appellee

OPINION—March 19, 1943

The appellant, a corporation, filed an inter-county tax return for each of the years 1938, 1939 and 1940. In each of said returns appellant omitted from its manufacturing inventory certain fibers produced in the Philippine Islands and in foreign countries claiming that said fibers were imports and not taxable by the State of Ohio. From its 1938 return appellant omitted fibers coming from the Philippine Islands of the value of \$57,500.00 and fibers coming from other countries of the value of \$410,030.00; from its 1939

return appellant omitted fibers coming from the Philippine Islands of the value of \$49,750.00 and fibers coming from other countries of the value of \$225,080.00; from its 1940 return appellant omitted fibers coming from the Philippine [fol. 123] Islands of the value of \$29,800.00 and fibers coming from other countries of the value of \$191,990.00, said amounts representing the average value of said fibers held in appellant's inventory during the preceding years respectively. On July 3, 1941 the Tax Commissioner made amended assessments against appellant for said years increasing appellant's average inventory by the above amounts respectively. Appellant filed an application for review and redetermination with the Tax Commissioner which was denied, whereupon the appellant filed the appeal herein.

The appellant is engaged in the business of manufacturing rope and twine products at Xenia, Ohio, in which manufacturing business it uses various fibers produced in the Philippine Islands and in foreign countries. Part of appellant's inventory consisted of these fibers in the original packages. Appellant claims that said fibers are imports and under the provisions of the Constitution of the United States are immune from taxation by the State of Ohio.

The record shows that these fibers were purchased from New York firms acting as agents of the vendors and shippers of said goods, part of which goods came from the Philippine Islands and part of which came from foreign countries; that these goods were purchased under written contracts prepared in duplicate or triplicate by the New York agent; that said contracts were signed in New York by the agent and forwarded to Xenia, Ohio, where they were signed by the appellant, one copy of which was retained by appellant and the others returned to the New York agent. Said contracts provide for delivery on dock at Baltimore, Maryland or other United States port; for payment on delivery on dock at destination; title to remain in seller until goods are fully paid for; that any increase [fol. 124] in the cost of ocean transportation of said goods will be for the buyer's account and any decrease for buyer's benefit; and that in case of loss at sea the portion of the goods so lost shall be excluded from the contract and the quantity reduced accordingly. The record shows that these goods were shipped by the seller to the port of destination consigned to the seller's agent. In some instances

a sight draft was attached to the bill of lading and in some instances the goods were consigned to the order of a bank, notify shipper's agent and the appellant. The goods while at sea were insured either by the seller or seller's agent. In case of loss at sea the insurance was payable either to seller or seller's agent. In cases where the bill of lading had a sight draft attached or was forwarded to a bank, it was taken up by the seller's agent. On arrival of the goods they were cleared through the port of entry by the seller's agent. The duties and other expenses, if any, were paid by the seller's agent, said expenses being included in the contract price. In practice the agent did not enforce the contract provision for cash on delivery but shipped said goods by rail from port of entry to appellant under a straight bill of lading. After arrival of the goods at Xenia, Ohio, appellant paid the contract price by check payable to seller's agent. The freight charges from port of entry to appellant's plant were paid by the appellant. While said goods were at sea the buyer carried "increased value insurance." War risk insurance while the goods were at sea was taken out by the shipper or its agent for the account of the buyer.

Goods that still retain their character as imports at the time the tax is proposed to be assessed are immune from state taxation under the provisions of Article I, Section 10 [fol. 125] of the Constitution of the United States. In this connection it must be established that the taxpayer is the importer, that the goods are still in the original packages in which they were imported and that they have not been sold or mortgaged by the importer or in any other way used or commingled with the goods and property of the state so as to lose their character as imports. The decisions seem to rest on the underlying principle that the goods are imported for sale and that while held by the importer they are still in a sense *in transitu*.

In *Brown et al v. The State of Maryland*, 12 Wheat. 419, 6 L. ed. 678, 688, it is stated:

"Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce."

In the instant case the record shows that these goods are in a warehouse at the manufacturing plant of the appellant and in the original packages; that they are held the same as any other raw material on hand and ready for use as the appellant may require them in its manufacturing business; that they are carried as a part of appellant's manufacturing inventory and reflected in its financial statement the same as any other asset of the company; that these statements are used by the appellant in the regular course of its business, furnished to banks for the purpose of obtaining credit, etc.; and that said goods are not held for sale. Even if appellant is the importer it may well be questioned whether said goods maintain the characteristics of imports within the meaning of the Constitution. They have reached their final destination. They cannot be said in any sense to [fol. 126] be still in commerce, or *in transitu*, or held in connection therewith.

The word imports as used in the Constitution means articles imported from a foreign country and does not include articles transported from a state or territory of the United States to some other state or territory of the United States. *14 Diamond Rings v. United States*, 183 U. S. 176, 46 L. ed. 138. See *American Steel & Wire Company v. Speed*, 192 U. S. 500, 48 L. ed. 538. *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257. In the latter case the first syllabus is as follows:

"1. The term 'imports' as used in that clause in the Constitution which declare that 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports,' does not refer to articles carried from one State to another, but only to articles imported from foreign countries into the United States."

The tariff act contains the following definitions, 19 U. S. C. A. 1336:

"(h) For the purpose of this section—

(1) The term 'domestic article' means an article wholly or in part the growth or product of the United States; and the term 'foreign article' means an article wholly or in part the growth or product of a foreign country.

(2) The term 'United States' includes the several States and Territories and the District of Columbia.

(3) The term 'foreign country' means any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions)."

[fol. 127] It follows that that portion of the goods involved shipped from the Philippines are not imports within the meaning of the Constitution and are not exempt from taxation.

The goods shipped from foreign countries were imported, but if they were imported before title became vested in the appellant, they have lost their characteristics as imports and are subject to state taxation.

In *Waring v. Mayor, etc., of Mobile*, 8 Wall. 110, 19 L. ed. 342, 345, the court referring to the federal statute said:

"All duties on goods, wares and merchandise imported shall be paid or secured to be paid before a permit shall be granted for landing the same"; which shows, to a demonstration that all the salt in this case was imported before the property in the same became vested in the complainant. . . . No one pretends that any of those acts can be performed before the goods are imported."

In that case the court held that the seller was the importer and while the facts are somewhat different, the material elements of risks, insurance, etc., are similar to those of the instant case.

The present tariff act provides, 19 U. S. C. A., 1483:

"For the purpose of this title—

(4) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. The underwriters of abandoned merchandise and the salvors of merchandise saved from a wreck at sea or on or along the coast of the United States may be regarded as consignees.

[fol. 128] (2) A person making entry of merchandise under the provisions of subdivision (h) or (i) of sec-

tion 484 (Sec. 1484 (h) or (i) of this title) (relating to entry on carrier's certificate and on duplicate bill of lading, respectively) shall be deemed the sole consignee thereof."

19 U. S. C. A. 1484 (a) provides:

"Except as provided in sections 490, 498, 552, and 553 and in subdivision (j) of section 336 of this act (secs. 1490, 1498, 1552, and 1553 and in sec. 1336 (j) of this title), and in subdivisions (h) and (i) of this section, the consignee of imported merchandise shall make entry therefor either in person or by an agent authorized by him in writing under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within forty-eight hours, exclusive of Sundays and holidays, after the entry of the importing vessel or report of the vehicle, or after the arrival at the port of destination in the case of merchandise transported in bond, unless the collector authorizes in writing a longer time."

In the instant case the goods were consigned to the seller's agent and under the provisions of the present tariff act, above quoted, said agent was the owner until the goods were cleared through customs. These provisions are similar to the provisions of the tariff act considered in *Waring v. Mayor, supra*.

In *Lafontan v. Elting*, 54 Fed. (2d) 664, 666, it was held:

"It is urged, however, by the defendants that the bill in the present case was a straight bill made out to American Import & Export Corporation 'or . . . assigns,' and that delivery could therefore properly be made to the named consignee without production of the bill. That, undoubtedly, is the law in this country with [fol. 129] respect to railroad carriers, and the Uniform Bills of Lading Acts . . . ; but it is otherwise in England with respect to water carriers . . ."

"In the present case, delivery under the federal statute could not legally be made without the production of the bill of lading, unless bond was given. No differentiation is made in that respect between straight and order bills, . . ."

Both the appellant and appellee in their briefs quote from the Uniform Sales Act, Ohio General Code, Section 8399. Whether the provisions of this act are applicable to these contracts, it is unnecessary to decide. It may be stated, however, that in so far as the issues herein involved are concerned said act is only declaratory of the legal principles existing prior thereto under which the same result would be reached.

In *B. & O. S. W. Ry. Co. v. Good et al.*, 82 O. S. 278, it was held in the first syllabus:

"In sales of specific chattels for cash on delivery, delivery and payment are concurrent acts, and delivery in the expectation of receiving immediate payment is not absolute but conditional, and when there is no waiver of payment, the property does not pass until the price is paid."

In *Rehr v. Lumber Company*, 110 O. S. 208; 214, the court held that Rule 4 of Section 8399, Ohio General Code, was not applicable and stated:

"The facts disclosed by the evidence, heretofore pointed out, warrant the conclusion that the intention of the parties was that there should be no complete delivery of the timbers until the conditions upon which delivery was to be completed had been complied with;

[fol. 130] The contracts herein involved come within the provisions of Rule 5 of Section 8399, Ohio General Code, which is as follows:

"If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

In 35 *Ohio Jurisprudence*, Article 77, p. 791, it is stated:

"If the contract calls for shipment 'f.o.b. buyer's point,' it anticipates delivery by the seller at that point, and, since something remains to be done by the seller before he has carried out his contractual obligation, the normal presumption would be that title did not pass until

delivery at the stated point. General Code, Section 8399, Rule 5, carries out this natural assumption."

In the instant case the goods were delivered by the seller on dock at Baltimore. The price was as a "landed price" and under the provisions of the general law or the Uniform Sales Act, title did not pass prior to the point of delivery.

It follows that the goods purchased from foreign countries were not imported by the appellant and that said goods are taxable by the State of Ohio.

Board of Tax Appeals.

[fol. 131]

No. 29531

ABSTRACT OF DOCKET OF BOARD OF TAX APPEALS

Appellant: The Hooven & Allison Company, Xenia, Ohio, No. 4441.

Appellee: William S. Evatt, Tax Commissioner of Ohio, Columbus, Ohio.

Attorneys: Messrs. Thomas C. Lavery, Cincinnati, Ohio, and Marcus E. McCallister, Xenia, Ohio, on behalf of the appellant.

Hon. Thomas J. Herbert, Attorney General of Ohio, and Mr. Aubrey A. Wendt, Assistant Attorney General.

Filed: July 31, 1941.

Nature of Appeal: Personal Property.

Date of Hearing: April 23, 1942, Columbus, Ohio.

Journal Entry: March 19, 1943.

[fol. 132] IN SUPREME COURT OF OHIO, JANUARY TERM, 1943

29531

Title of Case

THE HOOVER & ALLISON COMPANY, a Corporation, Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio, Appellee

Action: Appeal from the Board of Tax Appeals

Attorneys: .

Thomas C. Lavery, 1759 Union Commerce Bldg., Cleveland.

Marcus E. McCallister, Xenia, O.

Thomas J. Herbert, Aubrey A. Wendt, Columbus.

Memoranda of Pleadings, &c., Filed, Writs Issued, &c.

DOCKET ENTRIES

Apr. 13, 1943. Notice of appeal & proof of service filed.

May 5, 1943. Transcript of Record & Abstract of Docket of Bd. of Tax Appeals filed.

May 19, 1943. Transcript taken out by Thomas C. Lavery. 8/4/43 returned.

May 19, 1943. Application of Appellant for an extension of time to file brief filed.

May 19, 1943. Entry extending time for filing appellant's brief herein to July 6, 1943. E. S. Matthias, J. J 37-191.

June 25, 1943. Entry extending time for filing appellant's printed brief herein to August 5, 1943. E. S. Matthias, J. J 37-225.

Aug. 4, 1943. Appellant's printed brief & proof of service filed.

Aug. 31, 1943. Transcript taken out by Atty. Gen. Office. Sept. 7, 1943 returned.

Sept. 10, 1943. Leave to file appellee's brief on merits instantur filed.

Sept. 10, 1943. Appellee's printed brief & acknowledgment of service filed. 9/13/43 Proof of Service filed.

Oct. 11, 1943. Appellant's printed reply brief filed. 10/13/43 Proof Service filed.

[fol. 133] Nov. 24, 1943. Decision affirmed. J 37-315.

Dec. 7, 1943. Application for rehearing filed.

Dec. 15, 1943. Rehearing denied. J 37-334.

Jan. 7, 1944. Transcript of Record withdrawn by A. A.

Wendt. 1/10/44 returned.

Jan. 22, 1944. Pre-cipe for transcript of record filed.

JOURNAL ENTRIES

V. 37-191.

29531

Wednesday, May 19, 1943.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's printed brief herein be, and the same hereby is, extended to July 6, 1943.

29531

Friday, June 25, 1943.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's printed brief herein be, and the same hereby is, extended to August 5, 1943. J 37-225.

JUDGMENT

29531

Wednesday, November 24, 1943.

This cause came on to be heard upon the transcript of the record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein; and it appearing to the court that there was reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals to carry this judgment into Execution. J 37-315.

[fol. 134]

ORDER DENYING REHEARING

29531

Wednesday, December 15, 1943.

Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. J 37-334.

[fol. 135] Clerk's Certificate to foregoing paper omitted in printing.

THE HOOVEN & ALLISON Co., Appellant,

v.

EVATT, Tax Commr., Appellee

Taxation—Ohio corporation not an importer, when—State empowered to levy general property tax on imported goods, when.

1. Where an Ohio corporation contracts to purchase fibers grown in a foreign country at a landed price at port of entry in this country, with title to remain in the seller until goods are paid for, and such fibers are transshipped by seller's agent from port of entry to purchaser in Ohio, such Ohio corporation is not an importer.
2. The state has the power to levy a general property tax on imported goods so long as such tax does not intercept the import in its way to become incorporated with the general mass of property or deny to the import the privilege of becoming so incorporated until it shall have contributed to the revenue of the state.

(No. 29531—Decided November 24, 1943)

Appeal from the Board of Tax Appeals

Appellant is a corporation with its principal place of business in Xenia, Ohio, where it is engaged in the business of manufacturing rope, twine, packing, binder twine and similar products. Appellant's raw materials consist of manila hemp from the Philippine Islands; Java sisal from the Dutch East Indies; African sisal from British and Portuguese East Africa; Mauritius hemp from the island of Mauritius; jute from India; soft hemp from Italy, the Balkan states and South America as well as some fibers from Mexico and Cuba.

Appellant buys substantially all of its fibers from foreign producers represented by five New York agents who make frequent offers of fibers to appellant and appellant sometimes make counteroffers. When a sale is agreed upon the New York agent of the seller prepares and forwards to appellant a contract in duplicate signed by the agent on

behalf of his principal, which contract is then signed by [fol. 137] appellant. The contract covers the quantity of fiber wanted, the landed price, the time of shipment and frequently a designation of the steamship company upon whose vessel the fiber is to be shipped.

The contract also provides for delivery on dock at Baltimore, Maryland, or other United States port; for the payment on delivery on dock at destination, title to remain in seller until goods are fully paid for; that any increase in the cost of ocean transportation of such goods will be for the buyer's account and any *any* decrease for the buyer's benefit; and that in case of loss at sea the portion of goods so lost shall be excluded from the contract and the quantity reduced accordingly.

The record shows that the goods in question were shipped by sellers to the port of destination consigned to seller's agents. In cases where the bill of lading had a sight draft attached or was forwarded to a bank, it was taken up by seller's agent. On arrival the goods were cleared through the port of entry by seller's agent, the duties and other expenses, if any, were paid by the seller's agent. In practice the agent did not enforce the contract provision for cash on delivery but shipped said goods by rail from the port of entry to appellant under a straight bill of lading. After arrival of the goods at Xenia, Ohio, appellant paid the contract price by check payable to the seller's agent. The freight charges from the port of entry to appellant's plant were paid by appellant.

When the fiber was loaded on board ship at the point of origin, appellant received from the New York agent a declaration setting forth the name of the vessel, the number of bales shipped and the approximate date of arrival in the United States. About the time the fiber arrived at the port of entry in this country, a *pro forma* invoice giving the approximate tonnage and value of a shipment was sent by seller's agent to appellant. When [fol. 138] the fiber arrived at port of entry it was brought through the customs, weighed and shipped by rail under a straight bill of lading to Xenia, Ohio.

Appellant paid landed price which included the cost of fiber at point of origin plus normal ocean freight charges, insurance, clearance through the customs and arrangements for transshipment to Xenia. No duty is imposed on any of the fibers except true hemp which appellant always

buys duty paid. Appellant pays the railroad freight from the port of entry in the United States to Xenia, Ohio, and also the premium on increased value and war risk insurance as well as any variance beyond the normal cost of freight insurance, *et cetera*.

Each agent is solely the seller's agent and receives no compensation from appellant.

Upon arrival in Xenia, the fiber is placed in appellant's raw-material warehouse and there held in original packages until needed in appellant's processing operations. Such purchases are made for use in manufacture and with no intention of sale in original package.

While the bales remain in the raw-material warehouse, they are carried in a raw-material account on appellant's books; but upon their removal from such warehouse the bales are immediately charged to goods-in-process account whether the bales have been broken or not.

Less than 1/10 of 1 per cent of appellant's usual inventory is bought on spot purchases.

The sales contracts provide that equivalent delivery may be made from ship or store at seller's option; that payment is to be made in New York funds on delivery at dock of destination (port of entry); and that title is to remain in the seller until the goods are fully paid for. Notwithstanding the terms of the contract, appellant has never received spot delivery, has never paid the price of the goods [fol. 139] until after they have been delivered at Xenia, and sellers have never reserved any security interest or power of disposition of the goods by the form of the domestic bill of lading.

In its tax returns for the years 1938, 1939 and 1940, appellant omitted from its manufacturing inventory certain fibers produced in the Philippine Islands and in foreign countries, claiming that such fibers were imports and not taxable by the state of Ohio.

The Tax Commissioner made amended assessments against appellant for the years 1938, 1939 and 1940, increasing appellant's average inventory by the amounts of the imported fibers on hand during the respective years.

Upon appeal to the Board of Tax Appeals, the action of the Tax Commissioner was approved. The case is in this court following an appeal under Section 5611-2, General Code.

Mr. Thomas C. Lavery and Mr. Marcus E. McCallister,
for appellant.

Mr. Thomas J. Herbert, attorney general, and Mr. Aubrey A. Wendt, for appellee.

OPINION .

TURNER, J.:

Did the action of the Tax Commissioner violate Article I, Section 10, Clause 2 of the Constitution of the United States which forbids the levying by a state, without consent of Congress, of an impost or duty on imports? Paraphrasing the language of Mr. Chief Justice Marshall in *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 443, 6 L. Ed. 678, 686: Did the tax here imposed intercept the import in its way to become incorporated with the general mass of property and deny it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state?

The purpose of the foregoing provision of the Constitution was to prevent the seaboard states, as well as other [fol. 140] states, through which such imports were transported, from levying tribute before the imports reached their final destination and were sold or used by the importer.

Brown v. Maryland, *supra*, is the leading case on the subject. At page 441 (686 L. Ed.), Mr. Chief Justice Marshall said:

"But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; * * *. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; * * *."

At page 447 (688 L. Ed.), Mr. Chief Justice Marshall said:

"Sale is the object of importation."

Without reviewing here all the later pertinent decisions of the Supreme Court of the United States, we think the

following quotation from 15 Corpus Juris Secundum, 488, Section 123, correctly states the law, to wit:

"The constitutional provision [Article I, Section 10, Clause 2 of the Constitution of the United States] does not prohibit a tax on goods after they have entered the channels of trade or have been purchased subsequent to their arrival in this country, or after they have become mixed with other property in the state."

The record here discloses that the goods in question were purchased by appellant from New York agents of the sellers under written contracts which specifically provided that the [fol. 141] sales were made f. o. b. port of entry in this country (i. e., landed) and that title was to remain in the seller until the goods were fully paid for. The final invoices were made out by sellers' agents after the arrival and weighing of the goods at port of entry. All payments were made to the sellers' agents. These agents are exclusively representatives of the sellers and receive no compensation from appellant. After the goods had been cleared through customs, the agents of the sellers made rail shipments to appellant under straight bills of lading. No sales were made to appellant c. i. f.

One of appellant's witnesses stated that during the time here in question all contracts of purchase which were made with Stein, Hall & Company, Inc., of New York were made with that concern as a principal and not as agent. The agents through whom appellant made its purchases cleared the goods through customs.

Appellant's general manager testified:

"* * * Our deal with the seller is to get that material landed to a port of entry and cleared through and then it is turned over to us."

This is an accurate description of the transactions and clearly shows that appellant is not the importer, but rather the purchaser of goods subsequent to their arrival in this country under contract to so take them.

Appellant's general manager testified that none of these goods were purchased or held with a view to sale, but solely for the purpose of conversion in the course of manufacture. That appellant's contracts gave rise to imports cannot

be questioned. But the fact remains that the purchases and deliveries were made in the United States and that while interstate commerce was involved after the goods were landed, foreign commerce or imports were not. The [fol. 142] record discloses the following evidence offered on behalf of appellant through the answers of one of the sellers' agents:

"H & A do not buy c. i. f. but *landed at port in the United States.*

"When the goods arrive at an American port the documents are handed to us by the bank for the purpose of making customhouse entry and delivery. As a matter of service to H & A, the transshipment from port of arrival to Xenia is arranged by ourselves, H & A instructing us the route by which they wish the goods forwarded and, of course, *paying the freight from port of arrival to Xenia.*

"The foreign shipper does not reserve any power of disposition over the goods *after the documents are handed to the negotiating bank at port of origin.*

"The contract calls for payment by H & A on delivery of the goods on dock at port of entry in U. S. A. These terms are in practice modified to the extent that payment is not made until the goods are weighed on the dock and invoice received by H & A." (Italics ours.)

The record discloses that another agent answered:

"We definitely act as our principal's selling representative and this is borne out by the fact that we offer and sell at the same price quoted by our principals and receive a fixed commission from them. Up to about a year ago [answer made September 17, 1941] the contract was made between Stein, Hall & Company, Inc. [seller's agent] and Hooven & Allison Company, *both as principals*, but since then [about a year prior to September 17, 1941] we have been indicating on our contract 'sold by Stein, Hall & Company, Inc. for the account of'" (Italics ours.)

The contract forms used by each of the five sellers' agents from whom appellant purchased are identical in terms, with the exception that in *one* sisal contract form submitted by [fol. 143] Stein, Hall & Company, Inc., the provision for f. o. b. or landed on dock at destination is changed to c. i. f. and the provision for title remaining in seller until goods are fully paid for is eliminated.

Under a c. i. f. purchase the buyer takes title at point of

origin and pays the cost of insurance and freight *from point of origin*. Appellant's general manager testified that all their purchases were f. o. b. port of entry, that is, a landed price, and that if appellant had to buy c. i. f. there would be no excuse for agents to stay in business.

Assuming that appellant was the importer, these goods had so come to rest as to be mingled with the mass of property in this country when the state tax was levied thereon. This tax could not have the effect of intercepting the import nor did it deny to the import the privilege of becoming incorporated in the general mass of local property unless such tax payment was made.

That *sale* is the object of importation was made clear by Mr. Chief Justice Marshall in *Brown v. Maryland*; *supra*. Appellant's general manager testified positively that none of the goods in question were bought for the purpose of resale but were purchased only for the purpose of conversion by manufacturing processes.

The Supreme Court of the United States has held that when imports are once sold by the importer their character as imports is lost.

As stated by Mr. Justice Clifford in *Waring v. Mayor of Mobile*, 75 U. S. (8 Wall.), 110, 123, 19 L. Ed., 342, 346:

"Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import."

Mr. Justice Clifford distinguished between a sale by the [fol. 144] importer of the imported article and the breaking up of the original package when he said:

"When the importer sells the imported articles, or otherwise mixes them with the general property of the state by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer."

In discussing the case of *Brown v. Maryland*, *supra*, Mr. Justice Barbour said in the case of *Mayor of City of New York v. Miln*, 36 U. S. (11 Pet.), 102, 136, 9 L. Ed., 648, 661:

"The great grounds upon which the court put that case were: that sale is the object of all importation of goods:
 . . ."

In the *License Cases*, 46 U. S. (5 How.), 504, 575, 12 L. Ed., 256, 288, Mr. Chief Justice Taney said in respect of importation:

"And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported."

Appellant's general manager testified as above noted that none of these goods were purchased for the purpose of resale and that the only purpose of the purchases was use as raw material in appellant's manufacturing processes. When these goods arrived at Xenia, Ohio, appellant placed them in one of its raw-material warehouses where they were held until needed in the course of manufacture. When asked whether there was any definite time during which such goods were kept in the warehouse, ap- [fol. 145] pellant's general manager answered:

"No; it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances and we do not carry any more inventory than we need to; it takes three to six months for it to get to us; we attempt to keep a backlog for that; we attempt to run our business with a minimum working inventory, of course."

The bookkeeping procedure followed by appellant was to charge the raw-material account with these goods when received, and credit that account and charge the goods in process account when they were taken from the warehouse. This procedure was followed for the purpose of cost accounting. Appellant included its raw-material accounts in its assets as disclosed in its balance sheet and other financial statements.

No question is raised as to the amount of the assessments, if the goods are taxable. Under our holding it will be unnecessary to determine whether the goods imported from the Philippine Islands prior to the present war should be treated as coming from a foreign country.

Being of the opinion that the decision of the Board of Tax Appeals was reasonable and lawful, such decision is hereby affirmed.

Decision affirmed.

Weygandt, C. J., Matthias, Hart and Williams, JJ., concur.

Bell, J., dissents.

Zimmerman, J., not participating.

DISSENTING OPINION

Bell, J., dissenting. The conclusions reached by the majority in this case, in my opinion, are not warranted by the facts or the law.

[fol. 146] Clause 2, Section 10, Article I of the Constitution of the United States reads as follows:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: * * *"

That provision as it relates to this case is a prohibition against the state laying imposts on imports.

The fact that all of the goods here in question (with the possible exception of those coming from the Philippine Islands) are imports will admit of no dispute and so long as they remained imports the prohibition against their being subject to taxation by the state remained in full force and effect.

The question then is: Were these goods still imports at the time the state declared they were subject to tax?

The decisions are numerous upon the subject of when imported goods cease to be immune from state taxation. Generally speaking, it would seem that the immunity ceases, first, where the imports are sold after arrival in this country, and, second, where they are taken from the original package for sale or for use in a manufacturing process.

It must be conceded that the power to construe the Constitution of the United States is reposed in the federal courts, and that the state courts are bound to follow their decisions.

Probably the leading case upon the subject of *state taxation upon imports* is *Brown v. Maryland*, 25 U. S. (12

Wheat.), 419, 6 L. Ed., 678, decided in 1827. Chief Justice Marshall wrote the opinion of the court.

In that case the state of Maryland attempted to exact a license fee from persons engaged in the business of selling imports. The question presented was whether the exaction of the fee was within the prohibition contained in Clause 2, Section 10, Article I of the Constitution of the United States.

[fol. 147] In a lengthy and elaborate opinion the Chief Justice said in part:

"From the vast inequality between the different states of the confederacy, as to commercial advantage, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to 'lay imposts, or duties on imports or exports,' proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. . . ."

The tax in that case was condemned and held invalid. This case has been cited and followed for more than a hundred years.

The state of Maryland in that case was represented by Mr. Taney who argued that the license fee was lawful. He later became Chief Justice of the United States and in 1847,

[fol. 148] as Chief Justice, he wrote the opinion in the *License Cases*, 46 U. S. (5 How.), 504, 12 L. Ed., 256, in which he said in part;

"I argued the case in behalf of the state [referring to *Brown v. Maryland*], and endeavoured to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the state, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the state more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the states on the other, and preventing collision between them."

In the case of *Waring v. Mayor*, 75 U. S. (8 Wall.), 110, 122, 19 L. Ed., 342, the Supreme Court for the first time decided that where the goods had been sold after entry into this country they were no longer imports and the state could levy a tax upon the goods.

The decision in the *Waring case* has been followed ever since it was rendered.

The Tax Commissioner bottomed his decision upon the conclusion that a sale occurred after the imports arrived in this country and, upon appeal, the Board of Tax Appeals affirmed that decision.

The majority opinion of this court is bottomed upon a dual conclusion, first, that there was a sale after the goods arrived in this country, and second, that the goods were mixed with the general property in the state thereby destroying the immunity.

If there was a sale of the goods after arrival in this country [fol. 149], try that would make an end to the contention of appellant. See *Waring v. Mayor, supra*.

The proposition that courts will look through the form and to the substance of a transaction in order to determine the rights of the parties is so universally understood and accepted as to need no citation of authority.

It should also be kept in mind that, generally speaking, any statute imposing a tax should be strictly construed against the state and in favor of the taxpayer.

With these principles in mind a brief examination of the facts is necessary and important to determine, first, whether a sale took place after the imports reached this country, and, if no such sale took place, then second, whether the goods were so incorporated with the mass of property in this state as to destroy the immunity.

The undisputed evidence, together with the stipulations of counsel, disclose these salient facts: That appellant bought the goods in question through five New York sales agencies representing foreign producers; that on some occasions the offer to sell came from one of the five agents, and on other occasions the appellant would contact the agent and make an offer to purchase at a given price; that often the contracts were made before the goods were in existence; that after appellant and the agent had agreed upon a price, called a landed price, which included all ocean freight charges, insurance, etc., from the point of origin, the agent would submit the offer to the producer and get confirmation thereof; that after the confirmation was received by the agent a written contract generally would be executed between the appellant and the producer and thereafter the goods were shipped; that the contracts were executed upon uniform written forms which had been in use for many years; that the form contract provided that the title to the goods was to remain in the seller until the purchase price was paid; that this provision as to title was never enforced by the producer and was by mutual consent waived by the parties; that before the goods were shipped they were put up in bales and generally were marked so as to identify them with the contract; that the appellant determined the steamship line upon which the goods were to be shipped and determined the port of entry; that as soon as the goods left the point of origin the appellant immediately was notified and received the declaration of the ship; that appellant was responsible for the goods the minute the contract was made and the appellant had the right to re-sell the goods while upon the high seas; that the goods were shipped upon a bill of lading consigned by the producer to a bank, the bill of lading containing directions to notify appellant and the agent; that the agent

took up the bills of lading, paid the bank and then shipped the goods by rail to Xenia, Ohio; and that appellant was the importer.

The producer reserved no control over the goods after they were loaded on ship at point of origin except, as stated, that the bill of lading was issued to the order of the bank, with directions to notify appellant and the agent.

The title to the goods upon arrival in this country was either in the producer or the appellant. No one could seriously contend that the bank or the agent was at any time the owner of the goods.

The rule seems to be that where goods shipped in interstate commerce are earmarked for a purchaser and shipped under a bill of lading to the order of a bank with directions to notify purchaser, *the right of property passes to the purchaser when the particular property was designated, but the right of possession remained in the seller until the draft is paid.*

[fol. 151] In *Robinson & Martin v. Houston & T. C. Rd. Co.*, 105 Tex., 185, 146 S. W., 537, paragraph two of the syllabus states:

"Goods purchased were shipped by rail consigned to shipper's order, and draft for the price sent through the banks with bill of lading attached. Held that the purchaser had title to support an action against the carrier for delay in transportation occurring prior to his payment of the draft, though the right of possession up to such payment was in the shipper."

That case involved a boiler and on page 187, the court speaking through Brown, C. J., said:

"When the Erie City Iron Works sold the boiler to Robinson and Martin and delivered it to the railroad company at Houston, *the title rested in the purchasers*; neither payment of the price nor actual delivery to the purchaser was necessary to pass the title." (Cases cited.) See, also, *Dow v. Bank*, 91 U. S., 618, 23 L. Ed., 214; *F. L. Shaw Co. v. Coleman* (Tex. Civ. App.), 236 S. W., 178.

These are cases involving commerce between the states; however, it is difficult to discern any sound reason why the rule applied in interstate commerce cases as to an order notify bill of lading should not apply also to such bills of lading where used in foreign commerce.

The contract between the producer and appellant was the sole reason for shipping these goods into this country. This

record to me clearly demonstrates that it was the intention of the parties that title was to pass when the goods were placed on ship; that title did pass to appellant at that time; and that there was no sale of the goods after their arrival in this country.

With regard to the second conclusion of the majority, it is admitted that these goods were in the original packages at the time the exemption was claimed.

[fol. 152] In *Brown v. Maryland*, *supra*, it is said:

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; *but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.*" (Italics ours.)

In the *License Cases*, *supra*, Mr. Chief Justice Taney said:

"And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*; and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported."

Low v. Austin, 80 U. S. (13 Wall.), 29, 32; 20 L. Ed., 517, decided in 1871, is a leading "*original package*" case. Mr. Justice Field, in delivering the opinion of the court, said:

"The simple question presented in this case for our consideration is, whether imported merchandise, upon which the duties and charges at the custom-house have been paid, is subject to state taxation, whilst remaining in the original cases, unbroken and unsold, in the hands of the importer.

"The decision of this court in the case of *Brown v. The State of Maryland* furnishes the answer to the question.

"The Supreme Court of California appears, from its opinion, to have considered the present case as excepted

[fol. 153] from the rule laid down in *Brown v. The State of Maryland*, because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but only are included as a part of the whole property of its citizens which is subjected equally to an *ad valorem* tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney [*License Cases*, 46 U. S. (5 How.), 504, 575, 12 L. Ed. 256 (1847)], that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases. *Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition.* The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to state taxation, the extent and the character of the tax are mere matters of legislative discretion." (Emphasis added.)

This decision has never been questioned but has been approved and followed upon many occasions and is still the law of the land.

The second part of the conclusion of the majority, as set forth in paragraph two of the syllabus, is to my mind contrary to the decisions of the United States Supreme Court upon this subject.

The last question is whether the manila hemp from the Philippine Islands is entitled to protection as an import.

The cases of *Woodruff v. Parham*, 75 U. S. (8 Wall.), 123, 19 L. Ed., 382; *Pittsburgh & Southern Coal Co. v. Louisiana*, 156 U. S., 590, 600, 39 L. Ed., 544, 15 S. Ct., 459; and *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S., 345, 350, 43 L. Ed., 191, 18 S. Ct., 862, are authority for the proposition that an article cannot be an import unless it has been brought into this country from a country foreign to the United States.

Was the Philippine Islands during the years 1938, 1939 and 1940 a foreign country?

In *Cincinnati Soap Co. v. United States*, 301 U. S., 308, 81 L. Ed., 1122, 57 S. Ct. 764, in discussing the Philippine Independence Act, the court said:

“ . . . Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory.

See, also, the case of *Fourteen Diamond Rings v. United States*, 183 U. S., 176, 46 L. Ed., 138, 22 S. Ct. 59.

The decisions in those cases persuade me that the manila hemp from the Philippine Islands was not protected as an import.

In my opinion, therefore, the decision of the Board of Tax Appeals should be reversed and the cause remanded with instructions to allow the exemptions claimed upon the goods here in question except the manila hemp from the Philippine Islands.

[fol. 156] [File endorsement omitted]

[fol. 157] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed December 7, 1943

Now comes appellant, by its counsel, and makes this application for rehearing of the above-entitled cause, in which this Court affirmed the judgment of the Board of Tax Appeals, Department of Taxation of Ohio; and rendered judgment against this appellant and in favor of the appellee herein, and respectfully asks that a rehearing be granted for the following reasons:

I -

The conclusion of the Court, contained in the first paragraph of the syllabus, to-wit,

“Where an Ohio corporation contracts to purchase fibers grown in a foreign country at a landed price at

port of entry in this country, with title to remain in the seller until goods are paid for, and such fibers are transshipped by seller's agent from port of entry to purchaser in Ohio, such Ohio corporation is not an importer."

is squarely in conflict with the undisputed evidence contained in the record in this cause and is, therefore, erroneous as a matter of law.

The evidence shows that the terms of the written contracts upon which the Court based its opinion were not [fol. 158] adhered to and that by the actual course of business title to the fibers purchased in foreign countries passed to appellant before said fibers arrived in this country. It is the duty of this Court to look through the form of the transactions to their substance in order to determine appellant's right to immunity from taxation of said fibers by the state of Ohio, under Article I, Section 10, Clause 2, of the Constitution of the United States. *Bowman v. Tax Commission of Ohio*, 135 Oh. St. 295, 300, 20 N. E. (2d) 916 (1939), where Judge Hart said:

"The fact that a contract is in written form will not preclude inquiry into the nature of the transaction covered by the instrument. *Speyer & Co. v. Baker*, 59 Ohio St. 11, 25, 51 N. E. 442."

The validity of the ultimate finding of this Court is to be tested by what in fact was done rather than by the mere form of words used in the writings employed, *Helvering v. Tex-Penn Oil Company*, 300 U. S. 481, 493, 57 S. Ct. 569, 81 L. Ed. 755 (1937); *United States v. Phellis*, 257 U. S. 156, 168, 42 S. Ct. 63, 66 L. Ed. 180 (1921). See also 32 C. J. Secundum, Sec. 861, p. 791, 795, citing many cases; 37 Federal Digest, Sec. 236, p. 222, and cases cited.

II

The confusion of the Court, contained in the second paragraph of the syllabus, to-wit,

"The state has the power to levy a general property tax on imported goods so long as such tax does not intercept the import in its way to become incorporated with the general mass of property or deny to the im-

port the privilege of becoming so incorporated until it shall have contributed to the revenue of the state,"

is squarely in conflict with the undisputed evidence contained in the record in this cause that the goods were in the original package in appellant's hands, as importer, at the [fol. 159] time the tax thereon was laid and were, therefore, within the rule laid down by the Supreme Court of the United States in *Low v. Austin*, 13 Wallace 29, 32, 20 L. Ed. 517, (1871):

"Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition."

The second paragraph of the syllabus is, therefore, erroneous as a matter of law.

Thomas C. Lavery, Marcus E. McCallister, Attorneys for Appellant.

[fol. 160] [File endorsement omitted]

[fol. 161] IN THE SUPREME COURT OF OHIO

[Title omitted]

PREACIPE FOR TRANSCRIPT OF RECORD—Filed January 22, 1944

TO THE CLERK:

You are hereby directed to cause to be made and delivered to the undersigned a certified copy of the entire record, including the docket and journal entries, the opinion of the court, the application for rehearing, the order denying such application, and this praecipe, in the above entitled cause, with the exception of the following:

Form 947-B, preliminary assessment certificate attached to Form 945, Tax Return for the Year 1938 (duplicate of form attached to notice of appeal to Board of Tax Appeals).

Form 945-C-7, Form 945-C-8, Form 945-F-2, Form 945-K, Form 945-M and Form 945-M carbon duplicate, Tax Return for the Year 1938.

Form 947-B, preliminary assessment certificate attached to Form 945, Tax Return for the year 1939 (duplicate of form attached to notice of appeal to Board of Tax Appeals).

Two yellow work sheets dated June 26, 1941, attached to Form 945, Tax Return for the Year 1939.

Form 945-C-7, Form 945-C-8, Form 945-F-2, Form 945-M and Form 945-K, part of general Form 945, Tax Return for the year 1939.

[fol. 162] Form 947-B, preliminary assessment certificate (duplicate of form attached to notice of appeal to Board of Tax Appeals), and Form 905-S (blue), preliminary assessment certificate attached to Form 945, Tax Return for the year 1940.

Three yellow work sheets dated June 26, 1941 attached to Form 945, Tax Return for the year 1940.

Form 945-C-6, listing Hamilton County, Ohio, property, Form 945-C-8, Form 945-F-2, Form 945-K and Form 945-M, Tax Return for the Year 1940.

Order of Tax Commissioner re taxpayer's application for review and redetermination (duplicate attached to notice of appeal to Board of Tax Appeals).

Letters dated March 19, 1942, to interested parties and counsel transmitting opinion and entry of Board of Tax Appeals.

Thomas C. Lavery, Marcus E. McCallister, Attorneys for Appellant.

[fol. 163] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 164] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MAR 11 1944

CHARLES ELMORE BRIDLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 38

THE HOOVEN & ALLISON COMPANY,
a Corporation,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO,
and
BRIEF IN SUPPORT THEREOF.**

✓ **LUTHER DAY,**

✓ Union Commerce Building,
Cleveland, Ohio,

THOMAS C. LAVERY,

Union Commerce Building,
Cleveland, Ohio,

MARCUS E. MCCALLISTER,

Citizens National Bank Building,
Xenia, Ohio,

Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No.

THE HOOVEN & ALLISON COMPANY,
a Corporation,
Petitioner,

VS.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

The petitioner, The Hooven & Allison Company, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, affirming a decision of the Board of Tax Appeals of Ohio, denying petitioner's claim to immunity from general property taxation under Article I, Section 10, Clause 2, of the Constitution of the United States:

OPINIONS BELOW.

The opinion of the Board of Tax Appeals of Ohio is reported in 26 Ohio Opinions 25 (1943); and that of the Supreme Court of Ohio in 126 Ohio St. 235, 51 N. E. (2d) 723 (1943). These opinions are reprinted in the record, at pages 94 and 104 respectively.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on November 24, 1943 (R. 103). Application for rehearing was filed on December 7, 1943 (R. 119), and denied on December 15, 1943 (R. 103). The jurisdiction of this Court is invoked under Title 28, Section 344, paragraph (b), United States Code (Section 237, Judicial Code, as amended). *Citizens National Bank of Cincinnati v. Durr*, 257 U. S. 99, 42 S. Ct. 15, 66 L. Ed. 149 (1921); *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article I, Section 10, Clause 2, of the Constitution of the United States, and the pertinent provisions of the General Code of Ohio are set forth in the Appendix, pp. 20-22.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner buys fibers from producers in foreign countries for use in the manufacture of rope and similar products at its plant at Xenia, Ohio. The contracts specify the grade, quantity, price, and time of shipment of the fibers (which frequently have not been grown); and they often include the name of the carrier designated by the petitioner. When ready for shipment, the goods are appropriated to a particular contract, and petitioner is then notified of the name of the vessel, the number of bales shipped, and the approximate date of arrival in the United States. Upon arrival the goods are cleared through the customs by agents of the seller, weighed, and shipped by rail under straight bills of lading to Xenia, Ohio, where they are delivered to petitioner. In the course of business between the parties payment is not actually made until

the final invoice is received from ten to fifteen days after the goods have been delivered, notwithstanding a clause in the contracts that it shall be made on delivery on dock at destination, title to remain in the sellers until the goods are fully paid for.

During the years involved in this case, the fibers upon which the state of Ohio seeks to impose a general property tax were held by petitioner in its warehouses in the original packages in which they were imported. A part of the fibers so held were imported from the Philippine Islands.

THE QUESTIONS PRESENTED.

The questions presented are:

(1) Was petitioner the importer of the fibers brought into the United States from foreign countries pursuant to the contracts and course of business between it and foreign producers within the purview of Article I, Section 10, Clause 2, of the Constitution of the United States;

(2) Assuming that petitioner was the importer, were its imports immune from general property taxation by the state of Ohio while they remained in its warehouses in the original packages in which they were imported, under the limitation upon state taxing power contained in Article I, Section 10, Clause 2, of the Constitution of the United States; and

(3) Were the fibers brought into the United States from the Philippine Islands imports within the meaning of that term as used in Article I, Section 10, Clause 2, of the Constitution of the United States.

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

1. In holding that petitioner was not an importer within the purview of Article I, Section 10, Clause 2, of the Constitution of the United States, the Supreme Court of

Ohio has decided a federal question of substance not heretofore determined by this Court. *Waring v. The Mayor of Mobile*, 8 Wallace 110, 19 L. Ed. 342 (1868), where the question, who is an importer, was considered by this Court, is, it is submitted, distinguishable from the instant case on its facts (Petitioner's brief, herein, p. 14).

2. In sustaining the power of the State of Ohio to impose a general property tax upon petitioner's fibers while they remained in its warehouses in the original packages in which they were imported, notwithstanding the limitation upon state taxing power contained in Article I, Section 10, Clause 2, of the Constitution of the United States, the Supreme Court of Ohio has decided a federal question of substance in a way probably not in accord with the "original package" doctrine as declared by this Court in *Brown v. The State of Maryland*, 12 Wheaton 419, 6 L. Ed. 678 (1827), and followed in *Low v. Austin*, 13 Wallace 29, 20 L. Ed. 517 (1871).

3. In declining to determine whether or not fibers brought into the United States from the Philippine Islands are imports within the meaning of that term as used in Article I, Section 10, Clause 2, of the Constitution of the United States, the Supreme Court of Ohio has failed to decide a federal question of substance appropriately presented for decision to it by the record in this case which has not heretofore been determined by this Court. The cases decided by this Court in which the status of the Philippine Islands has been involved have considered only their relation to the United States, *The Case of the Fourteen Diamond Rings*, 183 U. S. 176, 22 S. Ct. 59, 46 L. Ed. 138 (1901); *Cincinnati Soap Company v. United States*, 301 U. S. 308, 57 S. Ct. 764, 81 L. Ed. 1122 (1937). The relation between the Philippine Islands and a state of the United States has not heretofore been determined by this Court; nor has the theory of the so-called Insular Cases.

De Lima v. Bidwell, 182 U. S. 1, 21 S. Ct. 743, 45 L. Ed. 1041 (1901), and *Downes v. Bidwell*, 182 U. S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901), ever been applied to facts such as are here presented.

In support of the foregoing grounds of application for a writ of certiorari petitioner submits the accompanying brief.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of Ohio, commanding that Court to certify and send to this Court, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in case numbered 29531, entitled on its docket "*The Hooven and Allison Company v. William S. Evatt*," to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed with costs, and for such other and further relief as may be appropriately granted in the premises.

LUTHER DAY,

THOMAS C. LAVERY,

MARCUS E. MCCALLISTER,

Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No.

THE HOOVEN & ALLISON COMPANY,
a Corporation,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition for a writ of certiorari refers to the opinion of the Court below, the decision of the Board of Tax Appeals of Ohio, the grounds upon which jurisdiction is invoked, and the pertinent constitutional and statutory provisions. It also sets forth a summary statement of the matter involved and states the questions presented.

STATEMENT OF THE CASE.

The facts of the case as disclosed by the amended assessment certificates of valuation and distribution (R. 4A, 4B, 4C), notice of final determination (R. 2), notice of appeal (R. 1), and the transcript of proceedings and testimony (R. 33-89), are as follows:

Petitioner is a corporation organized under the laws of the state of Ohio in 1888, with its principal place of business at Xenia, Ohio (R. 38). It is engaged in the business of manufacturing rope, twine, packing, binder twine,

and similar products (R. 39). The raw material which it uses in its manufacturing operations consists of manila hemp from the Philippine Islands; Java sisal from the Dutch East Indies; African sisal from British and Portuguese East Africa; Mauritius hemp from the Island of Mauritius; jute from India; and soft hemp from Italy, the Balkan States and South America; domestic binders, sisal, or henequen from Cuba and Mexico; and istle from Cuba (R. 39).

The course of business by which raw material is obtained is as follows: Petitioner buys substantially all of its fiber from foreign producers represented by brokers who have their offices in the city of New York (R. 39, 63-88B). These brokers make frequent offers of fiber to petitioner; or, when it is in the market for fiber, it communicates with the brokers, usually by telegraph or telephone, infrequently by letter. When a certain grade of fiber is sought, petitioner asks the broker handling that grade for a quotation. If the price quoted is higher than petitioner is willing to pay, it makes an offer which is cabled by the broker to his principal in a foreign country; and upon receipt of an acceptance from the principal the broker prepares and forwards to petitioner a contract in duplicate signed by the broker as agent on behalf of his principal. Upon receipt of the contract it is signed by petitioner and one copy is returned to the broker in New York (R. 39-40). Such a contract covers the quantity, price and time of shipment, and frequently a designation by petitioner of the steamship company upon whose vessel the fiber is to be shipped (R. 40, 47).

There are many grades of fiber and contracts of purchase almost invariably specify the grade and the estate from which it comes (R. 58). Frequently the fiber specified in a particular contract has not been grown when the contract is signed (R. 40). Many of the sources of fiber are in remote parts of the earth and from three to six months

may be required for the transit from the point of shipment to the point of destination at Xenia, Ohio (R. 42).

When the fiber is loaded on board the vessel at the point of origin, petitioner receives from the broker in New York a declaration setting forth the name of the vessel, the number of bales shipped, and the approximate date of arrival in the United States (R. 40); and this is followed, about the time the fiber arrives at the port of entry, by a *pro forma* invoice which gives the approximate tonnage and value of the shipment (R. 40). The fiber is then brought through the customs, weighed, and shipped by rail under a straight bill of lading to Xenia, Ohio (R. 40), where it is delivered by the carrier to petitioner (R. 41). Later, within ten or fifteen days after the receipt of final invoice, the purchase price is paid (R. 42).

At the time the fiber is loaded on board ship in a foreign port it is earmarked for petitioner (R. 40) in such a way as to show that the shipment is being made to fulfill the requirements of a particular contract. Neither a property interest in nor a power of disposition over the goods to secure the payment of the price is reserved by the seller, either by the form of the bill of lading or otherwise, since sales to petitioner are, as heretofore stated, credit sales (R. 42, 78).

While petitioner does not purchase its fibers c.i.f. (R. 61), the price it pays for the goods is known as a "landed price" which includes the cost of fiber at the point of origin, plus normal ocean freight charges, insurance, clearance through the customs, and the expense of arrangement for transshipment to Xenia, Ohio (R. 41, 58, 59, 61, 78-79). No duty is imposed on any of the fibers imported except true hemp (R. 41), and in that case petitioner always buys its fiber duty paid (R. 41). Petitioner pays the railroad freight charges from the port of entry in the United States to Xenia, Ohio (R. 59), and also the premium on increased-value and war-risk insurance. In fact, any variance

beyond the normal cost of freight, insurance, etc., is for the petitioner's account (R. 3-59).

The New York brokers with whom petitioner deals in purchasing fiber are in no sense its agents and it does not pay them any compensation for the services they render in clearing the fiber through the customs, for having it weighed, or for arranging for its transshipment by rail to Xenia, Ohio, since it is understood that the cost of such services is included in the contract price (R. 62).

When the fiber reaches Xenia, Ohio, it is delivered to petitioner, placed in its raw-material warehouses and held there until needed in its processing operations (R. 42). While in the warehouses the fiber remains in the original packages in which it is received from abroad, i.e., in bales ranging from 200 to 1,000 pounds in weight, which are sometimes covered with reed and bound with steel bands, and sometimes merely bound without a covering (R. 43).

While the bales remain in the raw-material warehouses they are carried in a raw-material account on petitioner's books (R. 42, 43); but upon their removal from such warehouses they are immediately charged to the goods-in-process account, whether the bales have been broken or not (R. 43). No use whatever is made of the bales of fiber while they remain in the raw-material warehouses (R. 45); and they are never pledged as collateral to secure the repayment of bank loans (R. 44).

Three buildings are used by petitioner as raw-material warehouses, in two of which fiber in the original packages only is stored. In the third, both raw material and finished goods are stored, but they are kept in separate rooms, in compliance with provisions of petitioner's insurance policies (R. 49, 50). Petitioner rarely makes a spot purchase, i.e., a purchase of fiber which is in the United States at the date of purchase, less than one-tenth of one percent of its usual inventory ever having been purchased in that manner (R. 50).

While the terms of fiber contracts between petitioner and the producers of fiber in foreign countries provide that equivalent delivery may be made from ship or store at seller's option, that payment is to be made in New York funds on delivery on dock at destination, and that title is to remain in the seller until the goods are fully paid for, the sellers with whom petitioner deals do not require it to comply with these terms (R. 72, 74A, 78, 83, 84, 84A, 87, 88A). On the contrary, petitioner has never received a delivery of fiber from stock on hand in the United States (R. 53), has never paid the price of the goods until after they have been delivered to it at Xenia, Ohio (R. 42); and the sellers have never reserved any security interest in or power of disposition over the goods when they are shipped, either by the form of the bill of lading or otherwise (R. 41).

Petitioner has never rejected a shipment of fiber, even though it makes no inspection at the port of entry. Should a shipment be found to be inferior upon inspection at Xenia, Ohio, petitioner would accept it and file a claim against the seller; and if such claim were not adjusted to its satisfaction, the matter would be referred to arbitration pursuant to a clause in the sales contract (R. 60).

The course of business herein described was the regular course of business of petitioner and its suppliers during the years now under consideration; and it is the usual course of business of the industry in which it is engaged (R. 53).

SPECIFICATIONS OF ERROR.

The Supreme Court of Ohio erred

(1) in denying petitioner's claim that it was an importer within the purview of Article I, Section 10, Clause 2, of the Constitution of the United States;

(2) in sustaining the power of the state of Ohio to impose a general property tax upon petitioner's fibers while they remained in its warehouses in the original packages in which they were imported, notwithstanding the limitation

upon such power contained in Article I, Section 10, Clause 2, of the Constitution of the United States; and

(3) in declining to determine whether or not fibers brought into the United States from the Philippine Islands were imports within the meaning of that term as used in Article I, Section 10, Clause 2, of the Constitution of the United States.

SUMMARY OF ARGUMENT.

I.

The fibers in petitioner's inventory were imports within the meaning of that term as used in Article I, Section 10, Clause 2, of the Constitution of the United States; and while they remained as such in petitioner's warehouses in the original packages in which they were imported they were immune from taxation by the state of Ohio.

II.

The fibers brought into the United States from the Philippine Islands were imports within the meaning of that term as used in Article I, Section 10, Clause 2, of the Constitution of the United States.

ARGUMENT.

In listing its inventory for general property taxation in the state of Ohio as required by Sections 5371 and 5378, General Code of Ohio (Appendix pp. 20-22), petitioner omitted certain fibers on the ground that as imports they were immune under the limitation upon state power contained in Article I, Section 10, Clause 2, of the Constitution of the United States as interpreted by this Court in *Brown v. The State of Maryland*, 12 Wheaton 419, 6 L. Ed. 678 (1827), in which the original package doctrine was announced by Chief Justice Marshall, and in *Low v. Austin*, 13 Wallace 29, 20 L. Ed. 517 (1871), in which it was re-

affirmed. The Supreme Court of Ohio denied petitioner's claim on two grounds as shown by the syllabus¹ of its decision, which reads as follows (R. 104):

- "1. Where an Ohio corporation contracts to purchase fibers grown in a foreign country at a landed price at port of entry in this country, with title to remain in the seller until goods are paid for, and such fibers are transshipped by seller's agent from port of entry to purchaser in Ohio, such Ohio corporation is not an importer.
- "2. The state has the power to levy a general property tax on imported goods so long as such tax does not intercept the import in its way to become incorporated with the general mass of property or deny to the import the privilege of becoming so incorporated until it shall have contributed to the revenue of the state."

In short, the Supreme Court of Ohio held that petitioner was not the importer of the fibers sought to be taxed and that it was, therefore, ineligible to claim immunity from state taxation; but, granting that petitioner was the importer, the immunity from state taxation attaching to the fibers as imports had been lost by their incorporation into the general mass of property in the state.

¹ In Ohio, the syllabus of a decision of the Supreme Court is prepared by the judge assigned to write the opinion, and in all cases receives the assent of a majority. Accordingly, it is the rule that the syllabus states the law with reference to the facts upon which it is predicated. *The Baltimore & Ohio Railroad Company v. Baillie et al.*, 112 Oh. St. 567, 570, 148 N. E. 233 (1925).

I.

A.

The fibers in petitioner's inventory were imports within the meaning of that term as used in Article I, Section 10, Clause 2, of the Constitution of the United States.

The only case in which the question, who is an importer, has been considered by this Court is *Waring v. The Mayor of Mobile*, 8 Wallace 110, 19 L. Ed. 342 (1868). That case involved the legality of a tax imposed by an ordinance of the city of Mobile upon merchants and traders of the city. Waring was fined for non-payment of the tax and he brought suit to restrain the collection of the fine, alleging that he was exempt from the tax on the ground that the sales made by him were of merchandise in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were in the lower harbor of the port. He obtained a decree in the trial court which was reversed by the Supreme Court of the State of Alabama. A writ of error was sued out from this Court and the decree was affirmed. The Court said (pp. 119-120):

“Undoubtedly goods at sea may be sold by the consignees to arrive, and if they indorse and deliver the bill of lading to the purchaser, and he accepts the same under the contract as the proper substitute for the actual delivery and acceptance of the goods, the effect of the transaction is to vest a perfect title in the purchaser, discharged of all right of stoppage *in transitu* on the part of the vendor and indorser of the bill of lading.

“Nothing of the kind, however, was done in this case. On the contrary, the agreement was, that the loss, if before the delivery of the goods into the lighters, should fall on the shippers. Influenced by these considerations the court is of the opinion that the shippers or consignees were the importers of the sale, and

that the complainant was the purchaser of the importers, and the second vendor of the imported merchandise."

In holding that petitioner was not the importer of the fibers involved in this case, the Supreme Court of Ohio has bottomed its decision on the proposition that the sale of the fibers to petitioner occurred after they had arrived in this country because the contracts for their purchase provided that title should remain in the seller until the goods were fully paid for, notwithstanding the uncontradicted evidence of record that this provision of the contract, as well as others, was not adhered to by the parties and that the sales in fact were made on credit (R. 42, 52, 69, 72, 78, 84, 87).

The question is, therefore, whether the issue of petitioner's status as importer or not is to be determined under the technical rules of the law of sales applied to the form of the purchase contracts which, as the record shows, had no significance in the actual course of business between the parties; or on the basis of the realities of that course of dealing. In the *Waring* case the buyer had made no contract with the seller in a foreign country which specified the kind and quality of goods to be produced; which called upon the seller to deliver goods earmarked for the buyer to a carrier designated by the buyer; or which initiated and sustained a movement in foreign commerce ending only when the goods were unconditionally delivered to the buyer at his door. In this case all these salient factors are present and they unite as component parts of the course of business which from the time the contracts were entered into until they were performed by the delivery of the goods to petitioner at Xenia, Ohio, necessarily involved the introduction of fibers into this country from many foreign sources. Thus, it was petitioner's need for fibers which caused it to contract for such raw material with sellers in many foreign countries, thereby setting in motion a series

of events, each of which was an integral step toward the accomplishment of the single purpose of procuring raw material ~~for~~ shipment across the seas and delivery to petitioner's plant at Xenia.

The whole problem was summed up by the witness, R. L. Pritchard, one of the brokers from whom petitioner buys, when he said:

"The entire movement of the goods from first to last is the result of the order placed by H. & A." (Petitioner's Exhibit 1, R. 70.)

Manifestly, the *Waring* case is not a precedent for the rejection of petitioner's claim that it was an importer, and there is presented, therefore, a federal question of substance not heretofore decided by this Court.

B.

While the fibers remained as imports in petitioner's warehouses in the original packages in which they were imported they were immune from taxation by the state of Ohio.

Article I, Section 10, Clause 2, of the Constitution of the United States reads in part as follows:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: * * *"

- Chief Justice Marshall, in *Brown v. The State of Maryland*, *supra*, thus stated the original package doctrine:

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or pack-

age in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it. *Low v. Austin*, 13 Wallace 29, 20 L. Ed. 517 (1871). As indicated by the second paragraph of the syllabus of the Supreme Court of Ohio in this case, it concluded that, admitting that petitioner was the importer and that the fibers remained in its hands on the original packages in which they were imported, they had upon coming to rest in petitioner's warehouses become incorporated into the general mass of property in the state of Ohio because the purpose of importation was to use them as raw material in petitioner's manufacturing processes before their sale as finished products, rather than to sell them in the condition in which they were imported. Such an interpretation of this constitutional limitation is not supported by the decisions of this Court, and it is contrary to the inference which may be drawn from *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414, 60 S. Ct. 664, 84 L. Ed. 840 (1940), where it was assumed without decision that crude oil would upon its manufacture, become a part of the common mass of property in the state and thereafter lose its distinctive character as an import and its constitutional immunity as such from state taxation.

Accordingly, it is respectfully submitted, the record in this case presents a federal question of substance which has been decided by the Supreme Court of Ohio in a way probably not in accord with the decisions of this Court.

II.

The fibers brought into the United States from the Philippine Islands were imports within the meaning of that term as used in Article I, Section 10, Clause 2 of the Constitution of the United States.

Because of its holding that petitioner was not an importer, the Supreme Court of Ohio found it unnecessary to determine whether fibers brought from the Philippine Islands were imports.

Determination of whether or not goods brought into the United States from the Philippine Islands can under any circumstances be held to be imports within the meaning of that term as used in Article I, Section 10, Clause 2, of the Constitution of the United States, depends upon the meaning to be ascribed to it. If the term means goods brought to the United States from a point of origin outside the boundaries of the forty-eight states comprising the Federal Union, e.g., the open sea, then the nature of the political relation of the Philippine Islands to the state of Ohio is immaterial. If, however, the term imports means goods brought into the United States from a foreign country, the question whether or not the Philippine Islands are a foreign country as to the state of Ohio must be considered.

The relation of the Philippine Islands to the United States as a sovereign nation was before this Court in *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 22 S. Ct. 59, 46 L. Ed. 138 (1901) and *Cincinnati Soap Company v. United States*, 301 U. S. 308, 57 S. Ct. 764, 81 L. Ed. 1122 (1937), in each of which it was held that as to the United States, the Philippine Islands were not foreign territory. The general question of the relation of ceded territory to the United States was elaborately considered in the Insular Cases, *De Lima v. Bidwell*, 182 U. S. 1, 21 S. Ct. 743, 45 L. Ed. 1041 (1901), and *Downes v. Bidwell*,

182 U. S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901); and was explored by writers in legal periodicals at the turn of the century. See *Langdell*, "The Status of Our New Territories," 12 Harvard Law Review 365 (1899); *Thayer*, "Our New Possessions," *ibid.* 464 (1899); *Thayer*, "The Insular Tariff Cases in the Supreme Court," 15 Harvard Law Review 164 (1901); *Littlefield*, "The Insular Cases," 15 *ibid.* 169, 281 (1901). A more recent article in which the subject has been considered is *Fisher*, "The Status of the Philippine Islands under the Independence Act," 19 American Bar Association Journal 465 (1933). However, in none of these cases has the question of the political relation of the Philippine Islands to a state of the United States been passed upon. It has been held that while for all national purposes embraced by the Federal Constitution the states of the Union are one, united under the same sovereign authority and governed by the same laws, in all other respects they are necessarily foreign to and independent of each other. *Buckner v. Finley & Van Lear*, 2 Peters 586, 7 L. Ed. 528 (1829); *Bank of United States v. Daniel*, 12 Peters 32, 54, 9 L. Ed. 989 (1838). If, therefore, the states are foreign to each other, it is not unreasonable to urge that they are foreign to the Philippine Islands as a dependency of the United States. Thus, there is appropriately presented for decision a federal question of substance which has not heretofore been determined by this Court.

Respectfully submitted,

LUTHER DAY,

THOMAS C. LAVERY,

MARCUS E. MCCALLISTER,

Attorneys for Petitioner.

APPENDIX.**Constitutional Provision.**

Article I, Section 40, Clause 2, of the Constitution of the United States:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

Statutory Provisions.

Section 5371, General Code of Ohio:

"Personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. If such business is carried on in more than one taxing district in the same county, the return shall set forth the amount of the property used therein which is situated in each taxing district in such county, and the value of the whole of the personal property used in business shall be apportioned to and assessed in each of such taxing districts in proportion to the value of the personal property situated therein. Domestic animals not used in business shall be listed and assessed in the taxing district where kept. Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides. All other taxable property shall be listed and assessed in the municipal corporation in which the owner resides, or, if the owner resides outside a municipal corporation, then in the county in which he resides, excepting as otherwise provided in this chapter. Whenever, under any provisions of this chapter, taxable property, required by this section to be listed and assessed in the taxing district or county in which the owner thereof resides, is required to be listed by a fiduciary, such property shall

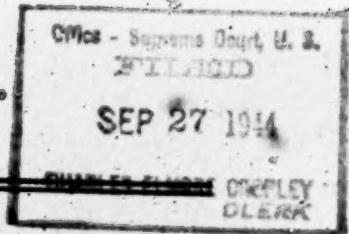
be listed and assessed by such fiduciary in the taxing district or county in which such fiduciary resides, or, in the case of joint fiduciaries, in which either such fiduciary resides; but such property belonging to the estate of a deceased resident of this state shall be listed and assessed in the taxing district or county in which he resided at the time of his death regardless of the residence of his executors, administrators or personal representatives, and such property belonging to a ward, minor, insane person, or beneficiary of a trust, residing in this state, title, custody or possession of which is vested in a non-resident fiduciary, shall be listed and assessed in the taxing district or county in which such ward, minor, insane person or beneficiary resides."

Section 5378, General Code of Ohio:

"A corporation having taxable property required to be listed in more than one county shall make a combined return to the commission, listing therein all its taxable property in this state, conformably to all the provisions of this chapter, but it shall not assign its property of the kinds mentioned in section 5328-1 of the General Code to any particular taxing district or districts, or county or counties. The commission shall assess the personal property of such corporation in the several taxing districts in which it is required by this chapter to be assessed, and shall issue assessment certificates therefor to the proper county auditors at the time and in the manner required by this chapter. All other property of such corporation, required to be so listed, shall be entered on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state and taxed under section 5638-1 of the General Code. The commission shall assess all such other property of each such corporation and, on or before the third Monday of May, annually, shall certify the total value or amount of each kind or class thereof, to the auditor of state who shall enter same on the intangible property tax list in his office in the

manner provided in chapter four of this title. Excepting as otherwise expressly provided in this section, all the provisions of this chapter shall apply to and govern such corporation, its proper officers and representatives, the commission and the county auditor with respect to all proceedings in the assessment of the property of such corporation."

FILE COPY



In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

THE HOOVEN & ALLISON CO.,
An Ohio corporation,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

BRIEF OF PETITIONER.

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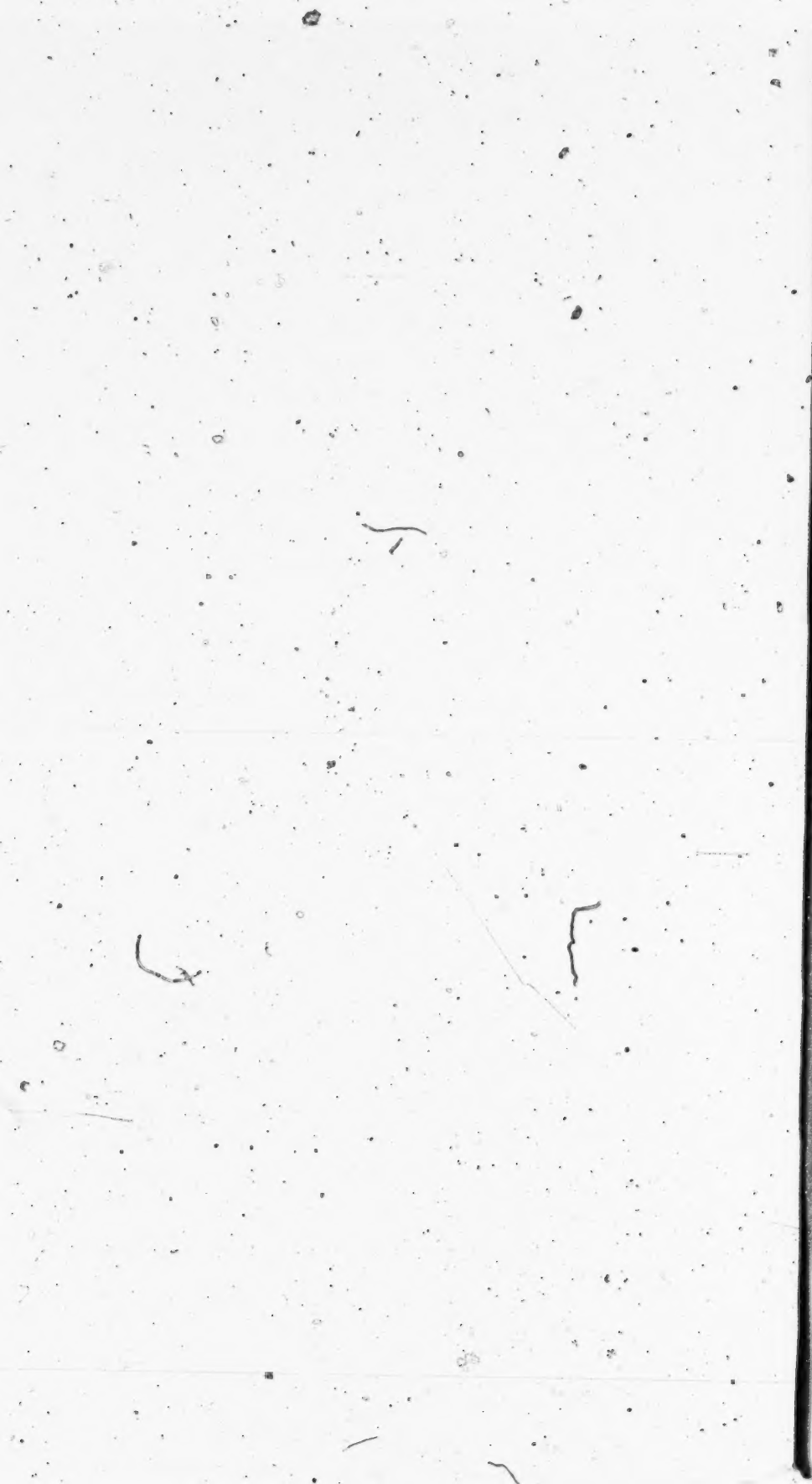
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<i>Fisher, The Status of the Philippine Islands under the Independence Act</i> , 19 American Bar Association Journal 465 (1933).....	40
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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

THE HOOVEN & ALLISON CO.,
An Ohio corporation,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

BRIEF OF PETITIONER.

A petition for a writ of certiorari directed to the Supreme Court of Ohio was granted by this Court on April 10, 1944, 321 U. S. 762.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals of Ohio is reported unofficially in 26 Ohio Ops. 25 (1943); that of the Supreme Court of Ohio is reported officially in 142 O. S. 235, 51 N. E. (2d) 723 (1943). These opinions are reprinted in the record at pages 94 and 104 respectively.

I.

STATEMENT OF THE CASE.

A. The Case Below.

In its Ohio personal property tax returns for the years 1938, 1939 and 1940, The Hooven & Allison Co., petitioner, omitted from its inventory the value of certain fibers on the ground that they were imports still in the original package, unused for any purpose, and consequently im-

mune from taxation by the State of Ohio under Article I, Section 10, Clause 2 of the Constitution of the United States. The respondent, Tax Commissioner of Ohio, however, decided that these fibers were subject to state taxation and assessed them for the years in question by his assessment certificates of valuation and distribution dated July 3, 1941 (R. 4A, 4B, 4C), adding their value to petitioner's taxable inventory.¹ Petitioner then applied to the respondent for a review and redetermination which application was denied (R. 2). Petitioner thereafter, on July 31, 1941, filed its notice of appeal with the Board of Tax Appeals, pursuant to Ohio General Code, Section 5611 (R. 1). After hearing, by its order dated March 19, 1943 the Board of Tax Appeals sustained the respondent's action (R. 90), with opinion (R. 94). On April 13, 1943 petitioner filed its notice of appeal to the Supreme Court of Ohio pursuant to Ohio General Code, Section 5611-2. The Supreme Court of Ohio, one judge dissenting, affirmed the decision of the Board of Tax Appeals, thus holding the fibers taxable.² (142 O. S. 235, 51 N. E. (2d) 723 (1943)); (R. 104). This Court thereupon granted certiorari. (321 U. S. 762 (1944).)

B. Facts.

The facts of the case are shown by the amended assessment certificates of valuation and distribution (R. 4A, 4B, 4C), notice of final determination (R. 2), notice of appeal (R. 1), and the transcript of proceedings, stipulations of the parties and the undisputed testimony of plaintiff's witnesses (R. 33, 38-39). The State of Ohio introduced no evidence. The petitioner's evidence consisted of the

¹ Those portions of the applicable statutes are set out in the appendix, pages 57-59.

² Ohio General Code, Section 5611-2 provides for an appeal to the Supreme Court of Ohio to obtain a reversal, vacation or modification of a decision of the Board of Tax Appeals.

oral testimony of one witness and two stipulations containing four exhibits (R. 38-63 and 63-89). The statements set forth in the stipulations are admitted to be true (R. 63).

The facts are as follows: petitioner is a corporation organized under the laws of the State of Ohio in 1888, with its principal place of business at Xenia, Ohio (R. 38). It is engaged generally in the business of manufacturing rope, twine, packing and oakum binder and similar products. The principal raw materials used in its manufacturing operations are fibers consisting of manila hemp from the Philippine Islands, Java sisal from the Dutch East Indies, African sisal from British and Portuguese East Africa, Mauritius hemp from the Island of Mauritius, jute from India, soft hemp from Italy, the Balkan States and South America; domestic binders, sisal and henequen from Cuba and Mexico; and istle from Cuba (R. 39). None of the fibers sought to be taxed in this case come from sources within the continental United States (R. 39, 55). It is not questioned that, with the exception of the Philippine Islands, the countries from which all these fibers came are foreign countries.

The course of business by which raw material is obtained is as follows: petitioner buys substantially all its fiber from foreign producers represented by five different brokers who have their offices in the City of New York (R. 39, 63-88B). These brokers frequently make offers of sale of fibers to petitioner; or, when the latter is in the market for fiber, it communicates with the brokers, usually by telegraph or telephone, infrequently by letter. When a certain grade of fiber is sought, petitioner asks the broker handling that grade for a quotation. If the price quoted is higher than petitioner is willing to pay, it makes an offer which is cabled by the broker to his principal in a foreign country; and which is usually accepted by the foreign principal. Thereupon the broker prepares and forwards

to petitioner a standard form of contract in duplicate signed by the broker as agent on behalf of his principal (R. 68, 71, 75, 84, 85). Upon receipt of the contract it is signed by petitioner and one copy is returned to the broker in New York (R. 39-40, 68, 71, 75, 81, 85). This contract covers the quantity, price, time of shipment, and frequently a designation by petitioner of the steamship company upon whose vessel the fiber is to be shipped (R. 40, 47).

There are many grades of fiber and the contracts of purchase almost invariably specify the grade and the estate from which it comes (R. 58). Frequently the fiber covered by a particular contract has not been grown when the contract is signed (R. 40). Many of the sources of fiber are in remote parts of the world and from three to six months may be required for the transit from the point of shipment to the point of destination at Xenia, Ohio (R. 42).

When the fiber is loaded on board the vessel at the point of origin, it is consigned to the broker in this country usually on order bill of lading "*notify The Hooven & Allison Company*" (the petitioner) or the broker (R. 68). Sometimes it is shipped to the broker on straight bill of lading (R. 82). Immediately upon loading a declaration is cabled to the New York broker setting forth the contract reference pursuant to which the shipment is made, the name of the vessel, the number of bales shipped, and the approximate date of arrival in the United States. The broker immediately notifies the petitioner (R. 40, 71, 77, 82, 86). This is followed, just prior to the time the fiber arrives at the port of entry, by a *pro forma* invoice which gives the approximate tonnage and value of the shipment (R. 40). Petitioner then usually gives instructions for shipping overland to Xenia. Thereafter the fiber is brought through the customs on behalf of petitioner by the broker-consignee, weighed, a final invoice made up from the weights then obtained, and shipped by rail under a straight bill of lading to Xenia, Ohio (R. 40), where it is

delivered by the carrier to petitioner, who pays the freight (R. 41, 59). Later, within ten or fifteen days after receipt of the final invoice, the purchase price is paid (R. 42).

At the time the fiber is loaded on board ship in a foreign port it is earmarked for petitioner (R. 40) in such a way as to show that the shipment is allocated to and made to fulfill the requirements of a particular contract. Neither a beneficial property interest in nor a power of disposition over the goods to secure the payment of the price is in practice reserved by the seller, either by the form of the bill of lading or otherwise, since sales to petitioner are, as heretofore stated, credit sales (R. 41, 42, 52, 53, 69, 73, 78). The respondent stipulates that these are credit sales (Stipulation, R. 63, 72, 82, 86).

The price the petitioner paid during the years in question for the goods is known as a "landed price,"—one which includes as its stated component elements the cost of fiber at the point of origin, normal ocean freight charges, insurance, clearance through the customs, and the expense of arrangement for transshipment to Xenia, Ohio (R. 41, 58, 59, 61, 78-79). This has most of the earmarks of a c.i.f. sale; although not so designated by name (R. 61). No import duty is imposed on any of the fibers except true hemp (R. 41), and in that case, petitioner always pays the duty as an element of the purchase price (R. 41). Any variance beyond the normal cost of freight, insurance, or any other element going to make up the purchase price is for the petitioner's account (R. 58-59).

Three types of insurance are provided for in the various forms of contracts involved: the usual marine insurance, war risk insurance and extra value insurance. The premiums for the marine insurance are paid by the petitioner, either directly or as an element of the purchase price. The same is true for the war risk insurance except a small percentage of the premium which is assumed by the seller (R. 83, 41, 69, 72, 78). The premium for extra value

insurance is always paid by petitioner and it is taken out at his request. In case of loss it is the beneficiary and is thus insured against loss of the goods on a rising market. If a loss should occur, the difference between the contract price and the increased value at which the goods are insured under the extra value insurance would be paid to Hooven and Allison after the claim is collected from the insurance underwriters (R. 78). The beneficiary of the marine and war risk insurance varies somewhat. In some instances it is payable to the foreign principal or the local agent, as their interests may appear (R. 72). In other instances it is payable to the local agent because, to facilitate the sale of the fibers, he had opened credits in favor of the seller (R. 69). In still others it is payable to the foreign principal, the local agent, if he has opened credits for the foreign principal, or to the negotiating bank, as the interests of the various parties may appear (R. 78, 79).

Petitioner does not pay the New York brokers, with whom it deals in purchasing fiber, any compensation for the services they render in clearing the fiber through the customs, for having it weighed, or for arranging its transshipment by rail to Xenia, Ohio, since it is understood that the cost of such services is included in the contract price (R. 62), and the contract is made with the understanding that these services will be performed by these agents.

When the fibers reach Xenia, Ohio, they are delivered to petitioner, placed in its raw-material warehouses and held there until needed in its manufacturing operations (R. 42). While in the warehouses the fiber remains in the original packages in which it is received from abroad, i.e., in bales ranging from 200 to 1,000 pounds in weight, which are sometimes covered with reed and bound with steel bands, and sometimes merely bound without a covering (R. 43). It is not disputed that these bales constitute original packages (R. 89).

While the bales remain in the raw-material warehouses they are carried in a raw-material account on petitioner's books (R. 42, 43); but upon their removal from such warehouses they are immediately charged to the goods-in-process account, whether the bales have been broken or not (R. 43). Petitioner makes no use whatever of the bales of fiber while they remain in the raw-material warehouses (R. 45). Some of the fibers are used immediately upon receipt, some are stored for three to six months. Petitioner keeps a minimum working inventory (R. 42).

Three buildings are used by petitioner as raw-material warehouses, in two of which only fiber in the original packages is stored. In the third, both raw material and finished goods are stored, but they are kept in separate rooms (R. 49, 50).

Petitioner rarely makes a spot purchase, i.e., a purchase of fiber which is in the United States at the date of purchase, less than one-tenth of one per cent of its usual inventory ever having been purchased in that manner (R. 50). No fibers so purchased are involved in this case (R. 53).

While the fiber contracts provide that equivalent delivery may be made from ship or store at seller's option, that payment is to be made in New York funds on delivery on dock at destination, and that title is to remain in the seller until the goods are fully paid for, the invariable practice, business custom and usage between sellers and petitioner is to disregard these terms (R. 72, 74A, 78, 83, 84, 84A, 87, 88A). Consequently petitioner has never received a delivery of fiber from stock on hand in the United States (R. 53); has not, for at least twenty-seven years including the transactions involved in the taxable years here in question, paid the price of the goods until after they have been delivered to it at Xenia, Ohio (R. 42, 45); and the sellers have never in actual practice reserved any security interest in or power of disposition over the goods

when they are shipped, either by the form of the bill of lading or otherwise (R. 41, 61, 69, 82, 86). The forms of these contracts have been standardized and in use for many years (R. 63, 83).

Petitioner has never rejected a shipment of fiber, even though it makes no inspection at the port of entry. Should a shipment be found to be inferior upon inspection at Xenia, Ohio, petitioner would accept it and file a claim against the seller; and if such claim were not adjusted to its satisfaction, the matter would be referred to arbitration pursuant to a clause in the sales contract (R. 60).

The course of business herein described was the regular course of business of petitioner and its suppliers during the years now under consideration and for a long time prior thereto. It is the usual course of business of the industry in which it is engaged (R. 53).

By stipulation of the parties it is agreed that the fibers added to the inventory of the petitioner by the respondent and upon which the tax in controversy is based come from the following sources and have the value set forth as follows (R. 89):

Year	Source	Value
1938	Countries other than the Philippine Islands	\$410,030
1938	Philippine Islands	57,500
	• • • • •	
1939	Countries other than the Philippine Islands	225,080
1939	Philippine Islands	49,750
	• • • • •	
1940	Countries other than the Philippine Islands	191,990
1940	Philippine Islands	29,800

Certain questions were propounded by interrogatories to the brokers acting as agents for the foreign principals who were the sellers of the fibers involved in this case. It

was stipulated by the parties hereto that the statements made by these brokers "may be considered as true for the purposes of this action, . . .," with the reservation of the right to both parties to object to anything contained therein on the ground of relevancy or competency, and the right to proffer additional testimony if desired (R. 63-64, 67). No question is now before this Court as to the relevancy and competency of this evidence. Hence all statements stand as true for the purposes of this case.

In answer to these interrogatories, R. L. Pritchard of R. L. Pritchard & Company stated that after the "goods are shipped from the foreign port and the documents are handed to the negotiating bank at the port of origin, foreign shipper does not reserve any power of disposition over the goods" (R. 69). M. S. Rosenthal, Vice President of Stein, Hall and Company, Inc., stated that when sisal is shipped "the goods are entirely at the risk of the buyer from the date they are loaded on to the vessel at port of shipment, and subsequent delivery to the buyer is contingent upon the safe and sound arrival of the goods" (R. 77). James Fyfe, another broker, stated that the seller could not divert the shipment at any time after the goods are loaded on board ship for the simple reason that they are already shipped for Messrs. Hooven and Allison under a specified contract and that the seller has no power of disposition over the goods either in the marine bill of lading or in the railroad bill of lading (R. 82). William Knight, representing Hanson and Orth, testified to the same effect (R. 86).

All brokers testified that in their opinion petitioner was the importer (R. 70, 73, 78-79, 84, 87).

The entire course of business and the basis of these opinions is aptly summarized by William Knight of Hanson and Orth Company who stated: "Viewing the entire course of these business's transactions, in my opinion Hooven and Allison should be considered as the real importers, for

I believe that the fundamental consideration is the fact that certain identifiable parcels of fibers are shipped from foreign countries specifically for Hooven and Allison and brought into this country on their order and for their use" (R. 87).

The state introduced no testimony whatever in this case. There is no conflicting evidence. That the fibers, except possibly those coming from the Philippine Islands, are imports is not questioned. That they were in the original package and unused by the petitioner when the respondent sought to assess the tax in dispute does not seem questionable.

The only questions before this Court are (1) whether petitioner was the importer, (2) whether these fibers had lost their character as imports when assessed for state property taxation; and (3) whether the fibers brought in from the Philippine Islands were ever imports, all within the purview of the imports clause of the Constitution.

II.

SPECIFICATIONS OF ERROR.

The Supreme Court of Ohio erred:

1. In failing to hold that petitioner was the importer of the fibers within the purview of Article I, Section 10, Clause 2 of the Constitution of the United States;

2. In holding that,—assuming petitioner was the importer,—the fibers had lost their immunity from state property taxation and had become commingled "with the general mass of property in this country"; and in sustaining the power of the State of Ohio to impose a general property tax thereon while they remained unused by petitioner in its warehouses in the original packages in which they were imported, notwithstanding the limitation upon such state taxing power contained in Article I, Section 10, Clause 2 of the Constitution; and

3. In failing to hold that the fibers brought into the United States from the Philippine Islands were imports within the meaning of that term as used in Article I, Section 10, Clause 2 of the Constitution of the United States.

III.

SUMMARY OF ARGUMENT.

1. In the absence of congressional waiver, imports as such carry a constitutional immunity from state taxation while they are retained by the importer in the original form or package in which received and such immunity continues until he has (a) sold the goods, or (b) so acted upon them by manufacturing or processing as to change their form from that which they possessed at the time of importation.

2. The importer within the purview of Article I, Section 10, Clause 2 of the Constitution is the person upon whom rests the risk of loss at the moment when the article imported is brought into this country:

3. In determining constitutional rights the entire group of facts involved must be considered, and the mere form of a contract or bill of lading standing alone is not determinative thereof. Such documents must be considered as a portion of the whole group of facts in the case.

4. The fibres involved in this case were brought into this country only because of orders originally given to the foreign principals through their local agents. When the contracts were made some of the fibres were ascertained but some were not even in existence. When loaded on ships in ports of foreign countries they were earmarked for petitioner and by appropriate marking allocated to fulfill the specific contracts between petitioner and the foreign sellers; and risk of loss was upon the petitioner from that moment. Petitioner was, therefore, upon the undisputed facts of record, the importer within the meaning of the import clause of the Constitution. The sales of the fibres.

took place when the goods were appropriated to the contracts and shipped from the foreign ports.

5. Beneficial title to the fibres passed to the petitioner at the time they were appropriated to the various contracts in the foreign ports of origin or at the latest when they were loaded on the steamships in the foreign ports to begin their journey to the United States.

6. The fibres, having been imported by petitioner for the purpose of manufacture and then sale, were immune from state property taxation while held by the petitioner in the same form as that in which they were brought into this country and not sold by it or used in its manufacturing processes.

7. Even though the fibres were brought in for the purpose first of manufacturing or processing and then of sale of the finished goods, they are, nevertheless, immune from state property taxation while remaining in the petitioner's hands in the original package until such time at least as they are first used in manufacturing operations.

8. Fibres coming from the Philippine Islands are imports within the meaning of the import clause of Article I, Section 10, Clause 2 of the Constitution.

IV.

ARGUMENT.

A. Applicable Constitutional Provision.

Article I, Section 10, Clause 2 of the Constitution of the United States in so far as applicable to the case at bar, provides:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . ."

B. The Original Package Doctrine—With Reference To Imports.

In *Brown v. Maryland*, 12 Wheat. 419 (1827),³ a statute of Maryland required all importers of foreign goods, by bale or package, and other persons selling such goods by wholesale, by bale or package, before they were authorized to sell, to take out a license from the state, paying a fifty-dollar license fee therefor. Refusal or neglect to take out such license subjected the vendor to certain penalties. Brown sold a bale of foreign dry goods in Maryland without having taken out such license, was indicted and a penalty was assessed against him. This judgment was affirmed in the Court of Appeals of Maryland and the case came to this Court on writ of error. Brown argued the inva-

³ "The case (*Brown v. Maryland*) is one of the most important ever decided by this court, and has been adhered to by a uniform series of decisions since that time." *Norfolk and Western Railway Company v. Sims*, 191 U. S. 441, 449 (1903). *Brown v. Maryland* has had a long continuous history and life. It has been recognized and applied in the following import cases among others: *Low v. Austin*, 80 U. S. 29 (1871); *Waring v. Mayor of Mobile*, 75 U. S. (8 Wall. 110) (1868); *Cook v. Pennsylvania*, 97 U. S. 566 (1878); *May and Company v. New Orleans*, 178 U. S. 496 (1900); *Anglo-Chilean Nitrate Sales Corporation v. State of Alabama*, 288 U. S. 218 (1933), noted in (1933) 46 Harv. L. Rev. 1024 (1933), 42 Yale L. J. 963; *McGoldrick v. Gulf Refining Company*, 309 U. S. 414 (1940); *Gulf Fisheries Company v. MacInerney*, 276 U. S. 124 (1928); *State ex rel. Gelpi and Bros. v. Board of Assessors*, 46 La. Ann. Rep. 145, 15 So. 10 (1894); *City of Detroit v. Lake Superior Paper Company*, 202 Mich. 22, 167 N. W. 852 (1918); *State v. Davis*, 67 N. J. L. 88, 50 Atl. 586 (1901); *In re Appeal of Pitkin*, 193 Ill. 268, 61 N. E. 1048 (1901); *In Re Appeal of J. W. Dove & Co.*, 197 Ill. 376, 64 N. E. 377 (1902); *Mexican Petroleum Corporation v. City of South Portland*, 121 Me. 128, 115 Atl. 900 (1922), criticized in *City of Galveston v. Mexican Petroleum Corporation*, 15 F. (2d) 208 (D. C. S. D. Tex. 1926), noted in (1927) 11 Minn. L. Rev. 368; *Mexican Petroleum Corporation v. Louisiana Tax Commission*, 173 La. 604, 138 So. 117 (1931), noted 80 U. of Pa. L. Rev. 592 (1932); *Southern Pacific Railway Company v. City of Calexico*, 288 Fed. 634 (D. C. S. D. Cal. 1923); *Tres Ritos Ranch Co. v. Abbott*, 44 N. M. 556, 105 P. (2d) 1070 (1940); *Imperial Development Co. v. City of Calexico*, 47 Cal. App. 666, 191 Pac. 50 (1926) (hearing denied by Supreme Court of California).

lidity of the statute as being in conflict with the prohibition in the United States Constitution of state taxation of imports or exports and with the power of Congress to regulate foreign commerce. Roger B. Taney argued the case for the State of Maryland seeking to uphold the license fee. This Court struck down the statute upon the ground that it was in conflict with both the import and commerce provisions of the United States Constitution.

This Court, speaking through Chief Justice Marshall, held that imports are things imported,—they are the articles themselves which are brought into this country. It is as imports that they bear this immunity from state imposition of imposts or duties. In answer to the argument of counsel for the State of Maryland that this constitutional provision, if carried to its logical extreme, would deny entirely the power of the State to tax imports, this Court held that at some given point in time goods which are imports become subject to the taxing power of a state. In resolving the question this Court stated (pp. 441, 442):

“It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.”

“• • • It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it

has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."⁴

Even though he argued against the position taken by the court in *Brown v. Maryland*, Chief Justice Taney later, in the *License Cases* (5 How. (46 U. S.) 504, 575, 1846) observed that more mature reflection convinced him that the holding of the court in *Brown v. Maryland* was correct.

"I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which

⁴ Compare the following:

"*Genuine Information delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention held at Philadelphia in 1787, by Luther Martin, Esquire, Attorney-General of Maryland, and one of the Delegates in the said Convention.* 3, FARRAND, RECORDS OF THE FEDERAL CONVENTION (1911), p. 172 at 215:

"(73) By this same section, every State is also prohibited from laying any imposts or duties on imports or exports, without the permission of the general government. It was urged, that, as almost all sources of taxation were given to Congress, it would be but reasonable to leave the States the power of bringing revenue into their treasuries, by laying a duty on exports if they should think proper, which might be so *light* as not to injure or discourage industry, and yet might be productive of considerable revenue. Also, that there might be cases in which it would be proper, for the purpose of encouraging manufactures, to lay duties to prohibit exportation of raw materials; and, even in addition to the duties laid by Congress on imports for the sake of revenue, to lay a duty to discourage the importation of particular articles into a State, or to enable the manufacturer here to supply us on as good terms as they could be obtained from a foreign market. However, the most we could obtain was, that this power might be exercised by the States with, and only with the consent of Congress, and subject to its control. And so anxious were they to seize on every shilling of our money, for the general government, that they insisted even the little revenue that might thus arise, should not be appropriated to the use of the respective States where it was collected, but should be paid into the treasury of the United States; and accordingly it is so determined."

required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the supreme court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the state government. . . .

This Court applied *Brown v. Maryland* with full force in *Low v. Austin*, 13 Wall. (80 U. S.) 29 (1871). In that case a statute of California subjected all property of every kind, name and nature within the state, with certain exceptions not here material, to taxation according to value. Low and others were importing, shipping and commission merchants in San Francisco. In 1868 they received wines on consignment from certain parties in France upon which the duties and other charges were paid at the customhouse. These wines were stored in the warehouse in the original cases in which they were imported and were there exhibited for sale. At this point they were assessed for state taxes which were ultimately paid under protest whereupon Low and the others sued the Tax Collector,

Austin, to recover the taxes so paid. The California trial court gave judgment for the plaintiffs and held the taxing statute void as contravening the federal prohibition on state taxation of imports. The Supreme Court of California reversed. Writ of error was then granted by this Court, which held that the California taxing statute, as applied to the facts of the case, was in contravention of the import clause of the Federal Constitution. The fact that the California tax reached all items of property uniformly and was not directed specifically upon imports as such did not aid the statute. Insofar as the statute levied a tax upon imports it was beyond the power of the state to enforce and therefore in contravention of the import clause of the Federal Constitution. Lacking the power to levy and assess such a tax, the question of whether it operated equally upon all properties or persons was not material.

In *Burke v. Wells*, 208 U. S. 14, 20 (1908) this Court said:

"The case referred to (*Brown v. Maryland*) is the leading one upon this subject, and has been cited perhaps as often as any of the great decisions of Chief Justice Marshall, and not attempted to be modified in the subsequent decisions of this Court."⁵

⁵ The cases dealing with the original package doctrine in interstate commerce should be distinguished from those cases involving the original package doctrine with reference to imports so far as immunity from state property taxation is concerned. This distinction was first made in *Woodruff v. Parham*, 8 Wall. 123 (1868); it was repeated again in *Brown v. Houston*, 114 U. S. 622 (1885) and in *American Steel and Wire Company v. Speed*, 192 U. S. 500 (1904). It was stated very cogently by Justice Taft in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 510 (1923): "The distinction is that the immunity attaches to the import itself before sale, while the immunity in the case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce." It is not clear from its opinion that the Supreme Court of Ohio kept this

(Continued on next page)

C. Analysis of the Decision of the Ohio Supreme Court Upholding the Tax.

The Supreme Court of Ohio upheld the tax in question upon two alternative grounds. First, the petitioner was not the importer, but a purchaser from the importer. Upon its construction of the facts it held that title to the fibers did not pass to the petitioner until after the goods arrived in this country and therefore, while conceding that the fibers in question were imports, it held that the importer was either the foreign shipper or his agent or broker in this country. Second, even if the petitioner were the importer, the fibers were not imported for sale but for the purpose of manufacture, had consequently become mixed with the general property of the state and therefore no longer enjoyed immunity from state taxation as imports. Because of its decision on these points, it did not find it necessary to decide whether the fibers coming from the Philippines were imports as being goods coming from a foreign country. The question was raised in timely fashion, however, and is now before this Court. The three issues will be considered in order:

D. The Petitioner Was the Importer of the Goods in Question.

To support its conclusion that petitioner was not the importer the majority of the Ohio Supreme Court fastened upon certain statements in the record, and certain contractual provisions, which the parties in practice ignored, as de-

(Continued from preceding page)

distinction in mind for in its opinion it said: "Assuming that appellant was the importer, these goods had so come to rest as to be mingled with the mass of property in this country when the state tax was levied thereon."

It is clear then that any reference to imports in cases dealing solely with interstate commerce constitutes dictum and not decision.

With reference to an unconstitutional tax on exports see *Spalding & Bros. v. Edwards*, 262 U. S. 66 (1923):

terminative and disregarded certain other undisputed or admitted facts which actually should be controlling. Quoting from the testimony of the petitioner's general manager that: "Our dealing with the seller was to get that material landed to a port of entry and cleared through and then it is turned over to us," the Ohio Supreme Court said that this accurately described the transactions by which the fibers were brought into this country and clearly showed that the petitioner was not the importer, but rather the purchaser of goods subsequent to their arrival in this country under a contract to buy them. In so holding it failed to consider all the undisputed and admitted facts of record.

It is axiomatic that constitutional rights will not be decided upon the form of a contract, but rather upon its substance and the actual course of dealing between the parties pursuant thereto. It is further settled that when constitutional rights or immunities are involved, this Court in cases coming to it from state courts will determine for itself from the record the existence of the controlling facts upon which such constitutional question is based. In *Davis v. Wechsler*, 263 U. S. 22, 24 (1923) Justice Holmes, speaking for the Court, said:

"If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decisions of the state tribunal as to what are the facts alleged to give the right or to bar the assertion of it even upon local grounds."⁶

With reference to federal control of interstate and foreign commerce, this Court has said that it is the essential character of the commerce, not the accident of local or through bills of lading which determine federal or state control thereover. *Railroad Commission of Louisiana v. Texas and Pacific Railroad Company*, 229 U. S. 336 (1913). The determination of the character of commerce with

⁶ See *Coombes v. Getz*, 285 U. S. 434, 441 (1932); *Detroit United Ry. Co. v. City of Detroit*, 242 U. S. 238, 249 (1916).

reference to federal control, this Court stated, is "••• a matter of weighing the whole group of facts in respect to it." *Atlanta Coast Line Railroad Company v. Standard Oil Company of Kentucky*, 275 U. S. 257, 268-9 (1927). The same reasoning should hold true in determining the existence, extent and possible infringements of rights and immunities conferred by the constitutional provision governing imports in cases coming to this Court from a State court. (*Waring v. Mayor of City of Mobile, infra; Low v. Austin, supra.*)

The Supreme Court of Ohio stated that the record discloses the goods in question were "purchased by petitioner from the New York agents of the sellers under written contracts which specifically provided that the sales were made f.o.b. port of entry in this country (i.e. landed), and that title was to remain in the seller until the goods were fully paid for" (R. 108). The terms of the contracts, the course of business and the intention of the parties indicate the complete contrary.¹

The petitioner's general manager, in addition to the one sentence quoted by the Supreme Court of Ohio, testified (R. 58) that while it bought goods f.o.b. port, the price included normal ocean freight, insurance, expense of clearance through the customs, the commission of the agent

¹ The understanding of those engaged in the export and import business appears to be contrary also. In Eldridge and Other Officials of the Bureau of Foreign and Domestic Commerce, *Export and Import Practice* (United States Department of Commerce, Trade Promotion Series—No. 175, 1938) at p. 162 it is said:

"An import broker in the United States is one who buys foreign goods, not for his own account, but for the account of another. He never takes title to the goods. His function is merely to bring buyer and seller together and negotiate the contract of sale. He may act either as agent for the buyer or as agent for the seller. For this service he receives a stipulated fee, payable by the party engaging him. After the sale is consummated the domestic buyer imports the goods in his own name, and arranges for their payment directly with the foreign seller."

in this country which included costs of arranging for rail shipment to Xenia, inspecting the bales and premium insurance up to one-half of one per cent. Any variances in freight or insurance were for the account of the buyer. In addition the entire premiums for marine and extra value insurance were paid for by the buyer.

The use of the expression "f.o.b." by the petitioner's witness was not particularly apt but read in the context it indicates the opposite from what the Supreme Court of Ohio construed it to mean.* The use of the expression f.o.b. should be construed in connection with the entire undisputed testimony of the petitioner's principal witness, and the stipulated facts of record and so construed shows actually that the fibers were shipped c.i.f. from the foreign port of origin.

In *United States v. Andrews*, 207 U. S. 229 (1907), this Court indicated that in construing the words f.o.b. it would consider the entire contract and all the surrounding facts. In that case the contract provided that goods were to be shipped to the consignee by the seller from this country f.o.b. Manila, Philippine Islands. A note to the steamship agent attached to the contract stated that certain arrangements had been made by the United States Government, the buyer, for ocean freight rates after the goods were delivered to him f.o.b. Jersey City, N. J., later changed to Brooklyn. The buyer, United States Government, paid the freight as an element of the purchase price. The goods were damaged before they reached Manila and were refused by the consignee, the Governor-General of the Philippines. This Court held that the seller could recover the purchase price from the buyer, United States

* A mistake or a slip in the use of a word should not stand in the way of a decision on the merits when it is obvious from a consideration of the entire facts of the case that a mistake or slip was made in the use of the word. See *Crew Levick Company v. Pennsylvania*, 245 U. S. 292, 294 (1917).

Government, in the Court of Claims. Title to the goods passed on delivery to the carrier at New York. The buyer paid all the ocean shipping charges from New York to Manila despite the fact that the contract provided that the shipment from this country was to be f.o.b. Manila, for the contract was required to be read in connection with the attached notes and the terms of the contract whereby the buyer was to pay the ocean freight charges to Manila.

The petitioner pays a "landed price" for the goods. This expression is merely a descriptive term to show the items included in the total price, items all covered in the contracts. It is not a specification of the time the parties intended title to pass as the Board of Tax Appeals and the Ohio Supreme Court evidently assumed.

The undisputed testimony and the stipulated facts in this case show clearly that each broker in New York acted as an agent for some grower or producer outside the continental limits of the United States, as in *United States v. Erie Railroad Company*, 280 U. S. 98 (1929). No contract was entered into until an offer from such foreign producer through his New York agent was accepted by petitioner or until an offer from petitioner through the New York agents was accepted by such foreign producer. No fibers were shipped into this country, so far as this case is concerned, except such as were shipped pursuant to contracts previously entered into. With the single exception of Stein Hall & Co. who for the years in question, did not disclose their principals but stated that they always acted for foreign principals, every broker asserted that he invariably sold for the account of or on behalf of his foreign principal. Stein Hall & Co. in fact acted for a foreign principal even though he was not disclosed.

Two situations are involved. First, where fibers already in existence were sold. Second, where the fibers were not yet grown,—a sale in effect of "future goods." In each case, however, when the fibers were shipped from the for-

foreign port they were earmarked not only for the petitioner, but appropriated to the specific contract involved. The declaration which was cabled to the agent in this country and by him immediately conveyed to the petitioner shows that the goods were so appropriated. The *pro forma* invoice sent to the petitioner a short time before the boat arrived at the port of entry shows a continuation of the same course of conduct. It was the custom of all except one of the brokers to send out the *pro forma* invoice. The *pro forma* invoice really had no utility in these transactions. Petitioner did not know why it was used. In the trade generally, however, it enabled the owner or consignee to make his own arrangements to get the goods through customs and to arrange for cash or credit to be available as each might be required by the particular sale.

The evidence shows (R. 60, 61, 76-77, 78, 82) petitioner had the right to dispose of the goods while in transit, and that the risk of loss from the time the goods were loaded on the steamer in the foreign port was upon the petitioner. This is amply substantiated, if such be necessary, by the undisputed testimony of petitioner's principal witness who stated that extra-value insurance was carried by his company upon the goods in question in order to protect the petitioner against loss of goods on a rising market (R. 58). Such insurance would not be available to the petitioner unless it had an insurable interest in the property involved. It could have such insurable interest if, but only if, some risk of loss of the goods in transit were upon it. (*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387 (1890).)

The Supreme Court of Ohio stressed the concept of passage of title in determining that petitioner was not the importer. Just what it meant by title to the goods is not clear. The court did not state whether it meant a security interest, the right of stoppage *in transitu*, risk of loss, right to possession, beneficial interest or all of them combined. The question of passage of title or the time when that title

passed should not be controlling in determining whether or not petitioner is the importer in this case.

In *Waring v. Mayor of Mobile* (8 Wall., (75 U. S.) 110 (1868)), an ordinance of the City of Mobile imposed a tax upon sales of merchandise made therein and subjected the merchant to a fine if he refused to account for and to pay over to the city such sales tax. The complainant made large sales of salt, failed to account and was fined for breach of the ordinance. He sued to restrain enforcement of the fine. The facts showed that many vessels came from England to Mobile to load cotton. In order that such vessels might not have to come in ballast, the charterers or owners of the vessels in England, apparently without previous order from anyone in this country, shipped salt to the agents of the vessels in Mobile. The complainant purchased that salt from these agents sometimes before and sometimes after the ships entered the harbor. The terms of his contracts of purchase in every case, however, provided that the risk of loss would continue to be on the shipper until the salt was delivered to the complainant into his lighters. No such delivery could be made until after the salt was entered in the customs office at the port of entry by the consignee or owner, the custom duties secured or paid and a permit to unload secured from the collector of the port. All this was done by the consignees. The complainant sold, to various retailers, the salt in the original bags in which it came. He objected to the payment of the fine imposed by the city on the ground that the sales tax in question was essentially a tax on imports under the doctrine of *Brown v. Maryland*. This Court held, however, that he was not the importer of the goods but that he purchased the goods after they reached this country and hence the second sale of the goods in which complainant was the seller was subject to state taxation even though they were still in the original package. The complainant argued that he purchased the salt before it was brought into this country and therefore he

was the importer; the sale sought to be taxed was actually the *first* sale of the goods and under the previous holdings of this Court was immune from state taxation. With reference to this argument it is significant that no reliance was placed upon the technical question of title or the passage of title. Justice Clifford noted the provisions of the contracts and commented upon the property interests of the seller and buyer as follows:

“ . . . The contracts to purchase were made before the goods were entered at the custom-house, with the consignees of the salt, sometimes before and sometimes after the arrival of the vessel at the anchorage in the lower harbor, but the terms of the contract in all cases were that the risk should continue to be in the shipper until the salt was delivered to the complainant over the side of the vessel into his lighters. He agreed to furnish the lighters and to bring them alongside of the vessel, and the contract was that the salt, when it was transshipped into the lighters of the complainant, became his property, and he assumed the risk and expense of transporting the same to the wharf and from thence to his own warehouse or place of business; but if the goods were lost before such delivery the agreement to purchase was not obligatory.

“ Whether the contracts to purchase were made before or after the vessel arrived in the bay is quite immaterial, as the agreement was, that the risk should continue to be in the owner or consignees until they delivered the salt into the complainant's lighters, alongside of the vessel. Delivery, under the terms of the contract, could not be made before the vessel arrived, nor before the salt was legally entered at the custom-house, as the hatches could not be removed for any such purpose until the permit was received from the collector.”

This Court did recognize that goods at sea may be sold by the consignee and if such consignee endorses and delivers the bill of lading to the purchaser, who accepts such delivery as the substitute for actual delivery and acceptance

of the goods, the purchaser gets a perfect title thereto while the goods are still at sea with no right of stoppage *in transitu* remaining in the seller. Justice Clifford stated further:

"Nothing of the kind, however, was done in this case. On the contrary, the agreement was, that the loss, if before the delivery of the goods into the lighters, should fall on the shippers. Influenced by these considerations the court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the importers, and the second vendor of the imported merchandise." (120.)

Construing the *Waring* case to mean that he upon whom the risk of loss rests is the importer the Supreme Court of Washington, under a state statute imposing a tax upon one who imports oil into the state, held that where the Pacific Oil Company brought oil into that state from California under a contract to sell it to the Northern Pacific Railway Company, but by the terms of the contract the risk of loss was upon the Pacific Oil Company until actual delivery the latter was, by such provision, the importer within a state taxing statute. *State v. Fidelity & Deposit Co. of Maryland*, 194 Wash. 591, 78 P. (2d) 1090 (1938.)

In any event, three years after the *Waring* case was decided, *Low v. Austin* recognized that complete legal title need not necessarily be in the consignee for purposes of immunity from state property taxation under the imports clause of the Constitution.

In the case at bar the Supreme Court of Ohio held that the contracts of petitioners with the foreign producers gave rise to imports, but that the sale did not occur until some time after the goods reached this country. Exactly at what point of time the sale occurred the court did not state. It found that the purchase price was never paid until after the goods reached Xenia. It assumed that these were cash

sales. Presumably, therefore, it must have concluded that the sale occurred either in New York or Xenia.

Such conclusion is contrary to *Norfolk and Western Railway Company v. Sims*, 191 U. S. 441 (1903), in which this Court held that when a resident of North Carolina ordered a sewing machine, to be shipped c.o.d. from Chicago, the contract of sale was completed when the machine was shipped from Chicago pursuant to the order. The sale did not take place in North Carolina where the purchaser paid the c.o.d. fee, the freight charges and received the machine. See also *United States v. Andrews*, discussed *supra*, page 21.

If a sale occurred in New York, it must have occurred at the time the New York agent of the foreign seller opened credits for the account of his foreign principal. This would fit in with the theory of the Supreme Court of Ohio that the sale was a cash sale. As pointed out by Judge Bell, dissenting in the case at bar, however, no one would seriously contend that the agent or bank was the owner and, of course, the purchaser, of the fibers.⁹ It is unthinkable that a principal would sell goods to his agent who would in turn immediately sell them to a customer of the principal upon orders previously accepted by the principal from the customer. If it be true that the agent of the foreign principal in New York is the purchaser then clearly he is not

⁹ The Tariff Act makes the consignee the owner of imports for the purpose of assessing import duties. Title 19, § 1483, U. S. C. By legislative fiat such consignee is made the owner of imports for the purpose and convenience of administering the tariff laws in an orderly manner. *United States v. Bishop*, 125 Fed. 181 (C. C. A. 8, 1903); Customs Regulations of 1923, Arts. 257, 258; 5 Code of Federal Regulations, Title 19, §§ 6.1, 6.8. Apparently the Ohio Board of Tax Appeals overlooked this important distinction (R. 98-99). The true owner may be some person other than the consignee. *Burke v. Davis*, 63 Fed. 456 (C. C. N. D. Ill., 1894). When an agent is the consignee of the goods imported his principal may be considered the real importer. *United States v. Mexican International Railroad Company*, 151 Fed. 545 (C. C. A. 5, 1907).

the importer but a purchaser from the importer within the doctrine of *Waring v. Mayor of Mobile*. The importer would, therefore, have to be the foreign principal. In such case if some sort of title remained in the seller till the goods were paid for, that title did not pass until the goods reached Xenia and were actually paid for according to the majority opinion.

It seems clear that the foreign principal is not the importer for he does not bring the goods into this country for the purpose of manufacture or sale. He sells them in the foreign country and ships them into this country for the purchaser,—petitioner. If the holding of the Supreme Court of Ohio on this point be carried to its logical extreme, there are (instead of a single transaction involved in the course of business here followed) a sale first from the principal to his agent and a second sale from the agent to the petitioner. Such is not consistent with the reasoning and implications in *Hamersley Mfg. Co. v. Erie Railroad Company*, 148 I. C. C. Rep. 47 (1928); reversed *sub nom. Eric R. R. Co. v. United States*, 32 F. (2d) 613 (D. C. S. D. N. J., 1929) decision of district court reversed and Interstate Commerce Commission affirmed in *United States v. Erie Railroad Company*, 280 U. S. 98 (1929).

In the *Erie Railroad Company* case the question was whether or not the Interstate Commerce Commission had jurisdiction to fix rates on shipments of paper pulp from Hoboken to Garfield, New Jersey. The pulp was imported from Germany under a course of business very similar to that followed in the case at bar, consigned to the agent of the German shipper in Hoboken who cleared it through the customs and re-shipped it on a local bill of lading to the H. Company, consignee, in Garfield, New Jersey. The H. Company had placed the order, which caused the goods to be brought to this country, with the agent in Hoboken who in turn transmitted it to his principal in Germany. In holding that this Court must look at the entire transaction to determine the existence of foreign commerce, and that

the shipment from Hoboken to Garfield, New Jersey was a shipment in foreign commerce within the meaning of the commerce clause of the Federal Constitution, this Court held that the parties intended the shipment from Germany to Garfield, New Jersey to be part of a single movement, that the form of the bill of lading was not controlling and that for constitutional purposes the entire movement was a unit. The question of passage of title was not material.

Applying the same reasoning by analogy, and upon very similar facts, it seems clear that in the case at bar the course of business, by which fibers are brought from Java (and other ports) to Xenia, constitutes one single transaction and not two transactions isolated from one another merely because an agent of the seller, for the convenience of his business and for the purpose of getting more business for himself, intervenes at the port of entry into this country and handles the details there necessary to secure the continued transportation of the fibers to the inland destination for the convenience of the petitioner who by its undisputed testimony is unable to and does not wish to be burdened with the details of customs clearance and rail shipping at the port of entry.

It seems clear from the undisputed and the admitted facts in the case at bar that the only sale here involved took place in a foreign port and that petitioner is the importer within the rule of *Waring v. Mayor of Mobile*. The undisputed and stipulated facts show that the risk of loss was upon petitioner from the moment the goods were delivered to the carrier at the port of origin in the foreign country. The beneficial interest vested in and the risk of loss was imposed upon the petitioner at that moment. In this connection the intention of the parties together with the contractual terms, the usages and customs of the trade and the undisputed facts concerning the course of business is controlling. (*Standard Casing Co., Inc. v. California Casing Co., Inc.*, 233 N. Y. 413, 135 N. E. 834 (1922); *Van Leunan*

Co. v. Meddock, 16 Ohio App. 309 (1922), motion to certify to Supreme Court of Ohio overruled, 20 Ohio L. Rep. 412 (1922)).

If the time of passage of beneficial title to the buyer be material in this case, then it seems entirely possible for constitutional purposes that title to the fibers in question or risk of their loss passed to the petitioner. (at the latest) the moment when the goods were earmarked for it, appropriated to the specific contract involved, and delivered to the carrier, quite often selected in advance by the petitioner, at the port of origin. *United States v. Andrews*, *supra*.

In *The Merrimack*, 8 Cranch (12 U. S.) 317 (1814) the question was whether the captor of an enemy ship in war-time was entitled to certain goods seized thereon as a prize on the theory that they were enemy goods, or whether these goods belonged to the claimants who were American citizens. The claimants had ordered the goods from the English manufacturing firm of Harris & Leich, of Leicestershire, England. Leich, an English citizen, lived in Leicestershire and Harris, an American citizen, resided in the United States. The bill of parcels for the goods, which served as an invoice, was in the name of the claimants. By bill of lading the goods were consigned to Harris. The sale was on credit. The goods were accompanied by a letter from Leich to Harris, the essence of which was that because of troubled international conditions the goods were shipped to Harris so that he could, if necessary, make a *bona fide* claim that they were his property. It was also stated that "... shipping them to you gives the power of keeping back to you." (319) Harris & Leich sent a letter, also on the same boat, from England to the claimants in which it was explained that to protect the goods in question they shipped them to Mr. Harris who could claim them, in the event of seizure, as his *bona fide* property. On this set of facts the claimants appeared in the prize court and

set up their claim to the goods in question. This Court held that the claimants should prevail, as a matter of prize law, and that title to the goods passed in England to the American claimants. The fact that the bill of lading was made out to Harris and not to the claimants did not affect the rights between the parties. The fact that the goods were subject to stoppage *in transitu* did not affect the passage of title. The bill of lading made out to Harris only gave him the right to demand the goods from the captain of the ship. The claimants by virtue of the invoice had the right to demand the goods from Harris. Both letters mentioned above stated that the shipment was made *on account of* the claimants. (The shipments in the case at bar were made the same way. R. 71, 84.) Inasmuch as this was a sale on credit, the court said it was not even necessary that the claimants make a tender of the purchase price to Harris before demanding the goods. The right of the consignee to demand the goods from the captain of the ship was not to acquire them for his own use but to the use of the claimants on whose account and for whose order they were actually shipped.¹⁰

In *Blum v. Caddo*, 3 Fed. Cas. 753 (C. C. D., La. 1870), the court held that delivery of goods to the carrier is constructive delivery to the vendee even though the vendee is a stranger to the carrier. The fact that the shipper has the right of stoppage *in transitu* does not mean that the risk of loss of the goods remains upon the vendor. Such right of stoppage *in transitu* is an additional security right to be exercised in the proper situation. If insurance is taken out by the vendor, but paid for by the vendee as an element of the purchase price, the situation is not altered and such insurance is not controlling in determining whether the risk of loss is on the vendee.

¹⁰ *The Odessa*, [1916] 1 A. C. 145, 154.

The fact that on the marine bill of lading the goods were consigned to the order of the shipper, notify *Hooven & Allison* or in some cases notify his agent, or were consigned on a straight marine bill of lading to the agent of the shipper does not alter the fact that the risk of loss or the beneficial interest in the goods passed to the buyer when the goods were delivered to the carrier at the foreign port. As previously mentioned, the question of imposition of risk of loss or the transfer of property in the goods is one of intention and that intention is to be gathered from all the facts of the case which include the contract, course of dealing between the parties and their intention ascertained in any other proper manner. In *Robinson and Martin v. Houston and T. C. Railway Company*, 105 Tex. 185, 146 S. W. 537 (1912), when goods were shipped to the consignee on an order bill of lading consigned to the seller's order with draft for the purchase price attached, with instructions to notify the buyer, it was held that title to the goods there involved passed when the goods were shipped. The buyer paid the freight. The court clearly distinguished between the right of possession which remained in the seller until the goods were paid for and the title or risk of loss which passed to the buyer when the goods were delivered to the carrier at the point of shipment. In *Standard Casing Company, Inc. v. California Casing Company, Inc.*, 233 N. Y. 413, 135 N. E. 834 (1922) goods were to be shipped f.o.b. San Francisco to New York by order bill of lading with sight draft attached. The buyer had the right of inspection before acceptance of the goods. The seller reserved the right to consign the goods to the order of the seller or the buyer. The goods were never shipped and the buyer sued the seller for damages for breach of the contract. The question was whether the market price in San Francisco or New York should prevail. The court held that if the goods had been shipped title would have passed upon delivery to the carrier in

San Francisco with risk of loss upon the buyer from such point. Judge Cardozo stated:.

“ * * * Title passes upon shipment, though subject to the right of rescission upon the discovery of defects.
* * *

“The incidence of the risk is unaffected also by the right, retained by the defendant, to determine whether the bill of lading should run to consignor or consignee. * * *

While a New York statute was involved, it was held merely declaratory of the common law. Accord: *The Van Leunen Company v. Meddock*, 16 Ohio App. 309 (1922), motion to certify overruled by the Supreme Court of Ohio, 20 O. L. Rep. 412 (1922); *Price v. Baum*, 71 Ohio App. 160, 48 N. E. (2d) 123 (1942).

In the case at bar normal marine insurance was taken out by the seller at the point of origin and the premium therefor paid by the buyer as one of the items going to make up the total purchase price. The war risk insurance was likewise taken out by the seller at the point of origin but because of the then fluctuating premiums the buyer agreed in his contract of purchase covering the goods to pay the cost of war risk insurance in excess of one-half of one per cent of the insured value. This insurance in each case was payable either to the foreign shipper, his broker agent in New York, or the bank, as the interest of each might appear. The reason why the insurance was so payable was explained by the brokers. Their principals were located on the opposite side of the globe. In case of loss, adjustment and collection of the purchase price might be difficult. To protect themselves, this insurance was taken. If any bank had advanced any money on the shipping documents, the bank would be indemnified from the insurance. In many cases to facilitate the transactions involved, the New York agents, who were in very close touch with Hooven & Allison at all times, would open credits at

a bank in favor of the sellers. In case of loss of the goods in such case, the insurance would amply protect them.

An understanding of the course of business of these fiber brokers clearly explains why they opened credits for their principals, the foreign sellers. The volume of business handled by them determines the maximum amount of commissions they can earn. The more service they can render to prospective purchasers in this country, the greater the business that potentially or actually will be theirs (R. 78-79). In effect they guaranteed the foreign principals against the credit that was extended to the purchasers in this country (R. 69, 81-82). One of the principal reasons why these brokerage houses continue in existence is the services they can render to domestic purchasers in effecting the sales of fiber for their foreign principals, the services they can render to their foreign principals in effecting collections in this country, their services in arranging at the port of entry in this country for the clearing of the fibers through customs and transshipment to interior points where manufacturing establishments are located. These latter services are customarily performed by the brokers on behalf of their foreign principals, but in reality as accommodations to and for the convenience of the American buyers.¹¹ In short

¹¹ The necessity for close contact with New York brokers is shown by the following testimony, which also discloses that petitioner was well known to the foreign principals (R. 56):

"Chairman Jenkins: Then all your negotiations are carried out with their agents in New York?

"The Witness: Yes. Principals will sometimes make a visit. We have an occasion where one of the principals was here from the Dutch East Indies talking over things and made a deal with him; the agent was there too—just a courtesy order, and happened to be a big one, a thousand tons of stuff. But the reason for the agents is they understand things here and those are big distances and quite often transactions have to be consummated quickly. The market may shift. It is so sensitive that if we make a bid or offer something at two o'clock and call back at three, unless they want to do it, it is gone."

these agents are almost indispensable in handling a course of business with which domestic purchasers are unfamiliar and ill-equipped at best to handle for themselves.

The undisputed testimony shows that petitioner did not want to be bothered by making trips to New York and undertaking itself to clear the fibers through customs and in arranging for their transshipment. It preferred to have this done by someone else under such circumstances as would include as an element of the purchase price the cost of these services.

E. The Term Imports Comprehends Goods Brought Into the United States Both for Purposes (a) of Sale, and (b) of Manufacturing or Processing Before Sale.

In *Brown v. Maryland*, *Waring v. Mayor of Mobile* and *Low v. Austin*, *supra*, the goods involved were all manufactured or processed goods brought into this country for the purpose of sale. In *Brown v. Maryland*, the statute specifically applied to an importer who brought foreign goods in to Baltimore for sale at wholesale, and in *Waring v. Mayor of Mobile*, the city ordinance involved imposed a tax on sales of goods. In *Low v. Austin* a general tax on personal property was in question. If this Court in these decisions had gone beyond the question of whether or not goods brought in for sale were subject to taxation by the state, any such utterance would have been *obiter dictum*. Notwithstanding this fact, the Supreme Court of Ohio based its decision upon the alternative ground that none of the fibers in question were brought in for sale but rather for the purpose of conversion by manufacturing processes, and therefore did not enjoy immunity as imports from state taxation. That the finished products were thereafter to be sold was not mentioned. It held, therefore, that the state tax sought here to be imposed did not intercept the goods nor deny to them privilege of becoming incorporated in the general mass of local property.

until such time as the tax was paid. It is submitted such holding is not supported by the authorities, by logic or by sound reasoning. In *Brown v. Maryland* the goods involved were imported for sale at wholesale. In 1827, when that case was decided, practically all the imports of this country were of finished products or products for consumption. (Bogert, *Economic History of the United States* (1938), 174-179). *Waring v. Mayor of Mobile* involved processed salt, and *Low v. Austin* bottled wine, all intended for sale. Therefore, the foundation cases for this rule dealt only with imports of finished products brought in for the purpose of sale. The concept of imports has not been so confined, however.

In *Gulf Fisheries Company v. MacInerney*, 276 U. S. 124 (1928), the complainant fish company sued to enjoin the enforcement of a license fee, imposed upon wholesale fish dealers by the State of Texas, based on the poundage of fish handled by the dealer. The Gulf Fisheries, a New York corporation, through its agents caught the fish in the Gulf of Mexico, apparently in international waters, landed them in bulk from the fishing boats on the wharf in Galveston, Texas, where some eighty-five per cent were processed,—the remainder merely washed, packed into barrels with ice and sold. None were placed in cold storage. Usually all the fish caught one day were shipped the same day. The complainant claimed that the fish were imports and therefore immune from state taxation. In deciding against the complainant the late Justice Brandeis stated "We have no occasion to inquire whether the fish are imports. Nor need we enquire whether the statute can be considered as an inspection law. On the facts agreed the tax is not laid until the fish have lost their distinctive character as imports and have become through processing, handling and sale a part of the mass of property subject to taxation by the state." The last sentence of the opinion states "They have lost their distinctive character as im-

ports and have become taxable by the state." It seems a fair inference from this case that if a property tax were involved and the fish had been held for processing and sale they would not have been liable to state taxation until such time as they had been processed, and possibly sold, but at least until they had been processed. See also *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414 at 423 (1940) wherein this Court said:

"For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation. See *Gulf Fisheries Co. v. MacInerney*, 276 U. S. 124; 126; *Waring v. The Mayor*, 8 Wall. 110; *May v. New Orleans*, 178 U. S. 496; *New York ex rel. Burke v. Wells*, 208 U. S. 14."

The Supreme Court of Louisiana in *Mexican Petroleum Corporation of Louisiana v. Louisiana Tax Commission*, 173 La. 604, 138 So. 117 (1931) squarely held that crude oil brought into Louisiana from Venezuela and Mexico for refining, and rape-seed oil brought into Louisiana from England for processing, and then sale, were imports within the meaning of the imports clause of the Federal Constitution and until such time as they were processed or sold were immune from state property taxation.

In summary, there is nothing in the imports clause of the Federal Constitution or the original package doctrine which prohibits the conclusion that imports may be brought from foreign countries into this country for sale but that processing may precede the sale, and until such time as the goods are processed they carry as imports an immunity from state property taxation. The decisions, either directly or inferentially, apply or recognize the immunity.

F. Articles Brought Into This Country From the Philippine Islands Are Imports Within Article I, Section 10, Clause 2 of the Constitution.

As to the fibers involved in this case which were brought into the United States from places other than the Philippine Islands, it is conceded that they were imports. With respect to fibers brought from the Philippines, the Supreme Court held that they were not imports since they had not come from a foreign country (R. 91). To this holding it is respectfully submitted, there are two answers: (1) under Article I, Section 10, Clause 2 of the Constitution, an article need not come from a foreign country to be an import as long as its point of origin is a point outside the territorial limits of the forty-eight states of the United States; and (2) conceding for the sake of argument only that an article to be an import must come from a foreign country, the Philippine Islands are a foreign country for the purpose of determining the scope of the immunity from state taxation stemming from Article I, Section 10, Clause 2 of the Constitution.

1. Fibers Brought into this Country from Abroad Constitute Imports within the Constitutional Provision.

The word "imports" as used in Article I, Section 10, Clause 2 of the Constitution of the United States was defined by Chief Justice Marshall in *Brown v. The State of Maryland*, 12 Wheat. (25 U. S.) 419, 437 (1827). He stated:

"What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country."

In this definition imports are not described by reference to their place of origin as a distinguishing characteristic. Later cases, however, at first glance seem to have added

the qualification that an article cannot be an import unless it has been brought into the country from a country foreign to the United States. Thus, in *Patapsco Guano Company v. Board of Agriculture*, 171 U. S. 345, 350 (1898), and in *Pittsburgh and Southern Coal Company v. Louisiana*, 156 U. S. 590, 600 (1895), it was said that the term "imports" applies only to articles imported from foreign countries, citing *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123 (1868), as authority for this proposition. While it is true in that case Justice Miller said that no one would for a moment think of imports as having relations to any other articles than those brought from a country foreign to the United States, it must be remembered that the issue to which he was addressing himself was whether or not articles brought into the State of Alabama from sister states were immune from taxation under Article I, Section 10, Clause 2 of the Constitution, and for that reason it was only necessary for him to determine whether or not goods brought into Alabama from such states could be regarded as imports. In holding that such goods were not imports he used the phrase "country foreign to the United States" merely to designate a place beyond the borders of the United States, without intending to refer to any specific place or places so situated. This interpretation of the language of Justice Miller seems warranted by his comment which immediately followed that "it is reasonable to suppose that . . . in defining imports as articles brought into the country, the Chief Justice used the word country as a synonym for United States," which, as will hereafter be shown, means the states composing the federal union and not the territory subject to its jurisdiction and under its sovereignty.

The term "United States" may be used in any one of at least three different senses: first, as the collective name of the states which are united together by and under the Constitution of the United States; second, as the name of a sovereign occupying a position analogous to that of other

sovereigns in the family of nations; and, third, to designate the territory over which the sovereignty of the United States extends. Commenting on these uses of the term, Dean Langdell, in an article, "*The Status of Our New Territories*," 12 Harv. L. Rev., 363, 371 (1899), said:

"... the use of the term 'United States' to designate all territory over which the United States is sovereign, is, like the similar use of the word 'empire' in England and other European countries, purely conventional; and ... it has, therefore, no legal or constitutional significance. Indeed, this use of the term has no connection whatever with the Constitution of the United States, and the occasion for it would have been precisely the same if the Articles of Confederation had remained in force to the present day, assuming that, in other respects, our history had been what it has been.

"The conclusion, therefore, is that, while the term 'United States' has three meanings, only the first and second of these are known to the Constitution; ..."¹²

On the assumption, therefore, that the word country was used by Chief Justice Marshall, as a synonym for the words United States, and that the words United States denote the collective name of states united together by and under the Constitution, it follows that an article is an import irrespective of the place of its origin so long as that place lies outside the territorial limits of the forty-eight states which compose the federal Union. This statement has the support of cases which hold that fish caught in the open sea and brought into the United States are imports within Article I, Section 10, Clause 2 of the Con-

¹² See also Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464 (1899); Thayer, *The Insular Tariff Cases in the Supreme Court*, 15 Harv. L. Rev. 164 (1901); Littlefield, *The Insular Cases*, 15 *ibid.* 169, 281 (1901). A more recent article in which the subject has been considered is Fisher, *The Status of the Philippine Islands under the Independence Act*, 19 American Bar Association Journal 465 (1933).

stitution. *Gulf Fisheries Co. v. Darrouzet*, 17 F. (2d) 374, 376 (1926); *Booth Fisheries Corporation v. Case*, 182 Wash. 392, 47 P. (2d) 834, 835 (1935). In *Gulf Fisheries Company v. MacInerney*, *supra*, p. 36, where it was claimed that fish caught in the Gulf of Mexico and landed in Texas were immune from state taxation as imports, this Court said that there was no occasion to inquire whether such fish were imports because on the agreed facts the tax was not laid until the fish had lost their alleged distinctive character as imports and had become through processing, handling and sale, a part of the mass of property subject to taxation by the state.

2. In Any Event, Shipments to the Petitioner from the Philippine Islands. Are within the "Original Package" Doctrine.

The Treaty of Paris, signed on December 10, 1898, and ratified on April 11, 1899, by which the Philippine Islands were ceded by Spain to the United States, unlike the treaties by which Florida, Louisiana and California were acquired, contains no provision which obligated the United States eventually to admit them into the Federal Union. On the contrary, it has always been assumed that they would be made independent as soon as they had developed the capacity for self-government. In 1934, the Philippine Independence Act was passed (48 Stat. 456, c. 84), under which, subject to war conditions, they will be set free in 1946. Thus, they have not and never will become a state in the union of states under the Constitution, *Texas v. White*, 7 Wall. (74 U. S.) 700, 721 (1868), and they are not and never have been a part of the United States except in the sense that internationally they are territory over which the United States is sovereign.

The history of the relation between the United States and the Philippine Islands is summarily stated in *Cincinnati Soap Company v. United States*, 301 U. S. 308, 318-320 (1937). There the court described the Philippines as

a dependency over which the United States for more than a generation has had and exercised the power of legislation and administration within the terms of the treaty of cession and those principles of the Constitution which by their nature are inherently inviolable. The Court said:

“ * * * the United States began by governing the Philippine Islands under the war power. Following the Treaty of Paris, a condition of armed insurrection persisted for some time. In 1900, military government was succeeded by a species of executive government. * * * In 1902, Congress provided for a complete system of civil government under the original Philippine Organic Act. By degrees, the active powers of the dependency have been enlarged, and those of the federal government decreased. But the authority which conferred additional power might at any time have withdrawn it. * * * ”

The Court also considered the question whether the passage of the Philippine Independence Act and the adoption and approval of the Constitution for the Commonwealth of the Philippine Islands has created a different situation. Continuing, it stated:

“ * * * Undoubtedly, these acts have brought about a profound change in the status of the Islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory. * * * ”

While the foregoing statement, that “so far as the United States is concerned the Philippine Islands are not yet foreign territory,” may or may not be exact, it has obviously no application to the problem involved in this case,—namely, whether goods brought from the Philippine Islands into the state of Ohio are imports within the meaning of Article I, Section 10, Clause 2 of the Constitution. In the proceedings before the Board, counsel for respondent strongly relied upon the *Case of the Diamond*

Rings (Fourteen Diamond Rings v. United States, 483 U. S. 176, 1901). That litigation arose under the Tariff Act of July 24, 1897, 30 Stat. 151. Pepke, as a soldier in the United States Army, after service in the Philippine Islands, returned to the United States and, on arriving at San Francisco, was discharged. He brought with him from Luzon fourteen diamond rings which he had there purchased, subsequent to ratification of the Treaty of Paris, February 6, 1899, and the proclamation thereof by the President April 11, 1899. In May, 1900, in Chicago, these rings were seized by a customs officer as having been imported contrary to law, and an information was filed to enforce their forfeiture. Pepke filed a plea claiming that the rings were not subject to customs duty, but it was held insufficient and forfeiture and sale were decreed. A writ of error was then prosecuted to this Court. The Tariff Act of July 24, 1897 was a regulation of commerce with foreign nations and levied duties upon all articles imported from *foreign countries*. The question presented was, therefore, were the rings acquired by Pepke after the ratification of the treaty was proclaimed, when brought by him from Luzon to California, imported from a foreign country? In holding that the rings were not subject to duty, the Court put its decision on the ground that the Philippine Islands were not a foreign country within the meaning of the phrase, "*imported from foreign countries*," as used in the Tariff Act. For its authority the court relied upon the case of *De Lima v. Bidwell*, 182 U. S. 1 (1901), where the question was whether goods imported into New York from Puerto Rico, after the cession, were subject to duties imposed by the Act of 1897 on "*articles imported from foreign countries*." It was held that they were not. The Court found that that act regulated commerce with foreign nations and that Puerto Rico had ceased to be within that category since territory could not be foreign and domestic at the same time. In *Downes v. Bidwell*, 182 U. S. 244

(1901), decided the same day, the Court held that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8, Clause 2, which declares that "all duties, imposts and excises shall be uniform throughout the United States." Putting these cases together, it is evident that all that was decided by *DeLima v. Bidwell* and therefore by the *Case of the Fourteen Diamond Rings* is that for the purposes of the Tariff Act of 1897, then under consideration, Puerto Rico and the Philippine Islands were not, after cession to the United States, foreign countries within the meaning of those words as used in that act. Likewise, all that can be drawn from *Downes v. Bidwell* is that for the purposes of Article I, Section 8, Clause 2, of the Constitution, Puerto Rico was not a part of the United States within the scope of that constitutional limitation. Manifestly, none of these cases can be regarded as authority for the proposition that fiber brought from the Philippine Islands is not an import within the meaning of Article I, Section 10, Clause 2 of the Constitution.¹³

¹³ Cf., *Dorr v. U. S.*, 195 U. S. 138, 142-143 (1904):

"In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the 'prohibitions' of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, supra."

See also *United States West India Oil Co. v. Damenech*, 311 U. S. 20 (1940).

a. Legislative Background of Philippine Commerce.

Since the era of the Insular Cases, Congress has constantly regarded the commerce of the Philippine Islands as wholly separate and distinct from the ordinary domestic commerce of the United States. It would accordingly be well to know the nature of that legislative treatment, as it existed during the years involved within the facts of the present case. To begin with, there are legislative restrictions upon the amount of manila and other fiber products which may be "exported to the United States . . . under export permits issued by the government of the Philippine Islands":

"Effective May 1, 1935, and for three years thereafter, the total amount of all yarns, twines, cords, cordage, rope, and cable, tarred or untarred, wholly or in chief value of Manila (abaca) or other hard fiber, produced or manufactured in the Philippine Islands, coming into the United States from the Philippine Islands, shall not exceed six million pounds during each successive twelve months period, which six million pounds shall enter the United States duty free.

"The amount or quantity of such articles which may be so exported to the United States shall be allocated, under export permits issued by the Government of the Philippine Islands, to the producers or manufacturers thereof." (U. S. C., Tit. 48, § 1236a. 47 Stat. 765; 48 Stat. 460.)

There are likewise provisions with reference to the amount of the "export tax" which may be levied on articles "exported to the United States from the Philippine Islands," (U. S. C., Tit. 48, § 1236(c). 47 Stat. 764; 48 Stat. 459). While it is true that the act of December 22, 1941 (U. S. C., Tit. 48, § 1236c; 55 Stat. 852), suspended the progressive reduction of quotas of the Philippine articles brought into the United States, nothing in this war-time measure amended the classification of such fibers as "exports."

Furthermore, the sugar quota law is clear and specific in defining as "imports" the amounts of that product brought into the United States from the Philippines:

"(1) Having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations—

"(A) (i) Forbid processors, persons engaged in handling of sugar, and others from importing sugar into continental United States . . . from the Virgin Islands, Philippine Islands, the Canal Zone, American Samoa, the island of Guam and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into or imported into continental United States . . ." (U. S. C., Tit. 7, § 608a. 48 Stat. 672; 49 Stat. 762; 50 Stat. 247).

In other words, for the sake of the domestic market, there are direct limitations placed on those "importing sugar into continental United States . . . from the Philippine Islands."

As already indicated, commerce between the Philippine Islands and continental United States is subject to general tariff regulations. For one thing, the Philippines have long been empowered to enact a tariff law:

"While this chapter provides that the Philippine government shall have the authority to enact a tariff law the trade relations between the islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States. . . ." (U. S. C., Tit. 48, § 1042; 39 Stat. 548.)

For another thing, along with this authority conferred on the Islands government by the Jones Act of 1916, there has been legislative recognition of the taxability of articles

brought into the United States from the Philippines. To all intents and purposes Philippine imports are treated by the tariff laws just like those coming from other countries:

"There shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries. * * ." (U. S. C., Tit. 19, § 1301; 46 Stat. 685.)¹⁴

The older tariff legislation has also been amended accordingly (U. S. C., Tit. 19, § 577; 32 Stat. 55).

Granted commercial relations with the Philippines have received from Congress special discriminatory treatment, it is important to note the increasing limitations being placed upon the travel of Filipinos to continental United States. For example, there is now a definite quota set up for immigration:

"(1). For the purposes of Chapter 6 of Title 8 (except section 213(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. * * ."

"(4) For the purposes of sections 154 and 156 of Title 8, the Philippine Islands shall be considered to be a foreign country." (U. S. C., Tit. 48, § 1238, 47 Stat. 768; 48 Stat. 463.)

Moreover, American consular officers are to be stationed in the Philippines for the purpose of supervising the movement of these "aliens" to the United States:

¹⁴ See 5 Code of Fed. Reg. (*Customs Regulations*), Tit. 19, § 5.2:

"(A) The Philippine Islands are not within the customs territory of the United States. Shipments between those islands and the United States are the subject of various specific statutory provisions defining their status. * * ."

“(3) Any Foreign Service officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may prescribe, during which assignment such officer shall be considered as stationed in a foreign country; . . .” (U. S. C., Tit. 48, § 1238, 47 Stat. 767; 48 Stat. 463.)

Various miscellaneous provisions fill in the details of the picture, so far as commercial “imports” from the Philippine Islands to continental United States are involved. In the first place, the Philippine Islands are now omitted from inclusion in the term “United States”:

“When used in this section in a geographical sense, the term ‘United States’ includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam. . . .” (U. S. C., Tit. 48, § 1236; 47 Stat. 764; 48 Stat. 459.)

Again, commercial intercourse between the Commonwealth and this country must still take into account the circumstance that the islands have their own coinage and currency (U. S. C., Tit. 48, §§ 1142 *et seq.*; 32 Stat. 952). A third instance has to do with the application of the anti-trust laws: by specific provision, the Philippine Islands are expressly excluded (U. S. C., Tit. 15, § 12, 38 Stat. 730). And finally under the heading *Detail of Officers and Men to Assist Foreign Governments*, it has been enacted that the President may detail officers and men of the Army to assist the governments of the republics of the Western Hemisphere and the “Philippines” (U. S. C., Tit. 10, § 540; 44 Stat. 565; 49 Stat. 218; 56 Stat. 763).

In the present state of federal legislation, it may well be said that articles brought into the various states of the United States from the Philippines should presently be regarded as imports within Article I, Section 10 of the Constitution. If one will substitute *Philippine Islands* for

Porto Rico in the following quotation, the views of Justice White in *Downes v. Bidwell* are applicable here (182 U. S. 244, 341):

"The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the Island had not been incorporated into the United States, but was merely appurtenant thereof as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such imposts, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico."

William Howard Taft, the first Governor-General of the Philippines, in *Balzac v. Porto Rico*, 258 U. S. 298, 305 (1922), while Chief Justice of this Court, after holding that certain provisions of the Constitution did not apply to Porto Rico, stated:

"It was further settled in *Downes v. Bidwell*, 182 U. S. 244, and confirmed by *Dorr v. United States*, 195 U. S. 138, that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it; and that the acts giving temporary governments to the Philippines, 32 Stat. 691, and to Porto Rico, 31 Stat. 77, had no such effect. The *Insular Cases* revealed much diversity of opinion in this court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court."

One may properly say, therefore, that the degree of foreignness or domesticity is in essence a matter for Congressional determination.¹⁵

The Philippine Independence Act of 1933.

In any discussion of the effect of the Philippine Independence Act, one meets at the start the *dictum* of Justice Sutherland in *Cincinnati Soap Company v. United States* (301 U. S. 308, 319, 1937):

"So far as the United States is concerned, the Philippine Islands are not yet foreign territory."

Yet it must be remembered that this Court was then confronted with the serious problem of upholding a federal processing tax on Philippine products, in the light of the then-binding authority of *United States v. Butler* (297 U. S. 1 (1936)). Justice Sutherland sought accordingly to bring the tax within the federal authority to lay taxes "to pay the debts of the United States"; and held that this excise was valid as an appropriation in discharge of a high moral obligation, amounting to a "debt" within the meaning of the Constitution. In these circumstances, that *dictum* regarding the status of the islands must be regarded as one compelled by the decision in *United States v. Butler*. Since the latter case is no longer controlling, the precise extent of Philippine sovereignty may once more be examined.

By virtue of the Philippine Independence Act of 1933, a constitution has been drafted for the government of the Commonwealth of the Philippine Islands, providing for the exercise of jurisdiction over all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on December 10, 1898. Furthermore, in accordance with law, that constitution has

¹⁵ Cf. *Fleming v. Page*, 9 How. (50 U. S.) 603 (1849).

been submitted to the President of the United States; and it has been duly certified by him as conforming substantially to the Philippine Independence Act. Thereafter, the constitution has been ratified by the people of the Philippine Islands, and appropriate officers chosen for the Commonwealth government. Following these events, by Proclamation No. 2148 of November 14, 1935, the President of the United States has proclaimed the termination of the Philippine government and the formation of the government of the Commonwealth of the Philippine Islands.¹⁶

It is thus important to note the express provision of the Act with reference to the transfer of property and rights to the Philippine Commonwealth:

"All the property and rights which may have been acquired in the Philippine Islands by the United States under the treaties mentioned in the section 1231 of this title, except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the Government of the United States, and except such land or other property or rights or interests therein as may have been sold or otherwise disposed of in accordance with law, are hereby granted to the government of the Commonwealth of the Philippine Islands when constituted." (U. S. C., Tit. 48, § 1235. 47 Stat. 764; 48 Stat. 459.)

The resultant juridical status of the Commonwealth of the Philippine Islands was examined by a lower federal court in *Bradford v. Chase National Bank* (24 Fed. Supp. 28, 37 (1938); affirmed on other grounds, 105 F. 2d 1001 (C. C. A. 2, 1939); affirmed without opinion, 309 U. S. 632 (1939)). In this case, the Secretary of War as *amicus curiae* filed a suggestion, claiming immunity for the gov-

¹⁶ The documents relating to the establishment of the government of the Commonwealth of the Philippines are collected in House Documents, No. 400, 74th Cong., 2d. Sess.

ernment of the Commonwealth of the Philippine Islands as a sovereign state. Judge Woolsey held as follows:

"If, however, I am wrong in so dealing with the suggestion of the War Department, I think that I must take judicial notice of the Philippine Independence Act—(Public 127, 73rd Congress), Title 48, United States Code, Sections 1231-1247, 48 U. S. C. A. §§ 1231-1247—providing for the creation of a sovereign state in the Philippine Islands, which though still subject in some respects, such, for example, as foreign relations, to the United States is similar—since the Proclamation of November 14, 1935, 49 Stat. 3481,—in its juridical status to the Government of Kelantan in the case of *Duff Development Company, Ltd., v. Government of Kelantan and the Crown Agents for the Colonies, Garnishees*, [1923] 1 Ch. 385, [1924] A. C. 797; and compare *Porto Rico v. Rosaly*, 227 U. S. 270, 273, 33 S. Ct. 352, 57 L. Ed. 507; *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 27 S. Ct. 526, 51 L. Ed. 834, and *Merritt v. Government of Philippine Islands*, 34 Phil. 311, 316.

"Thus the status of the Philippine Commonwealth as a sovereign is established without recourse to the suggestion of the Secretary of War."

It is no doubt true that the sovereignty of the Philippine Commonwealth is far from complete, by virtue of retention by the federal government of authority over foreign affairs, fiscal issues and judicial matters. Nevertheless, "all the property and rights" of the United States have now been granted to the Commonwealth government; and it would therefore appear that the Philippines are no longer to be regarded as a mere dependency of the federal government. Granted the Islands have not as yet attained complete independence, there has been enough of a transfer of sovereignty over to this new Commonwealth as to constitute it a nation separate and apart from the United States. In short, the Philippine Islands can no longer be regarded as merely a territory.

It is unnecessary to speculate here as to the precise status of the Commonwealth in international law, during the transition period. The essential fact remains that previous to the years 1938, 1939 and 1940,—within which years Philippine hemp was brought into this country by the petitioner,—the territorial status of the Islands had been modified. Local self-government had been granted, along with many of the attributes of national sovereignty. It is accordingly unsound to characterize the shipment of Philippine fibers from Manila to the United States as falling into any category other than that of importation. If state taxation can burden the commerce of a new nation, then the economic benefits of the transition period may be gravely jeopardized.

c. Relation of Philippine Islands to State of Ohio.

The problem in this case is to determine whether the Philippine Islands are foreign to the state of Ohio for the purpose of ascertaining the scope of the Constitutional limitation upon its power to tax, contained in Article I, Section 10, Clause 2, of the Constitution of the United States. The proposition that they are foreign to the state of Ohio is supported by the cases which hold that while for all national purposes embraced by the federal Constitution the states are one, united under the same sovereign authority and governed by the same laws, in all other respects they are necessarily foreign to and independent of each other. *Buckner v Finley & Van Lede*, 2 Pet. (27 U. S.) 586 (1829), *Bank of United States v. Daniel*, 12 Pet. (37 U. S.) 32, 54 (1838). Indeed, it was for this reason that control over both foreign and interstate commerce was vested in Congress by Article I, Section 8, Clause 3 of the Constitution. If, therefore, the states are foreign to each other as to all commerce not strictly local, the state of Ohio is *a fortiori* foreign to the Philippine Islands as a dependency

of the United States and as such peculiarly subject to its control.

An analysis of the terms of the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States will show that, insofar as the state of Ohio is concerned, that part of the inventory in this case which was brought into the state from the Philippine Islands is not subject to taxation. Article I, Section 8, Clause 3 confers upon Congress the power to regulate two kinds of commerce: that which is foreign and that which is interstate. The course of business involved in this case was obviously neither local nor interstate, and therefore it must have been foreign commerce. This conclusion is confirmed by the long-continued exercise by Congress of control over commerce with the Philippines under the regulatory power conferred upon it by the commerce clause.

Moreover, the Congress of the United States has not consented to the taxation of the property involved in this case and without such consent the attempt to do so is palpably unconstitutional. If it be assumed for the purposes of argument that goods brought into the United States from the Philippine Islands are not imports so as to be entitled to immunity from state taxation, they immediately become subject thereto upon reaching port in a state of the United States and may be taxed by each state through which they pass to reach their destination. Yet it was to prevent such taxation that this constitutional provision was adopted. In *Brown v. Maryland*, *supra*, Chief Justice Marshall observed (pp. 438-439):

“From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indis-

pensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to 'lay imposts, or duties on imports or exports,' proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. * * *

CONCLUSION.

It is, therefore, submitted that the petitioner in this case is the importer of the fibers in question; that the fibers brought into this country for manufacture and then sale were imports within the meaning of Article I, Section 10, Clause 2 of the Constitution of the United States; and that the fibers brought into the United States from the Philippine Islands are imports within the meaning of the same constitutional provision.

Taxation is a practical matter and not particularly concerned with the refinements of title. A constitutional immunity from state (property) taxation should not be made to depend upon "the witty diversities of the law of sales."¹⁷

¹⁷ Holmes, J., in *Rearick v. Pennsylvania*, 203 U. S. 507, 512 (1906).

Petitioner respectfully prays therefore that this Court will accordingly reverse the judgment of the Supreme Court of Ohio and hold the fibers here involved constitutionally immune from state property taxation. .

Respectfully submitted,

LUTHER DAY,
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Counsel for Petitioner.

APPENDIX.**Constitutional Provision.**

Article I, Section 10, Clause 2, of the Constitution of the United States:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

Statutory Provisions.

Section 5371, General Code of Ohio:

"Personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. If such business is carried on in more than one taxing district in the same county, the return shall set forth the amount of the property used therein which is situated in each taxing district in such county, and the value of the whole of the personal property used in business shall be apportioned to and assessed in each of such taxing districts in proportion to the value of the personal property situated therein. Domestic animals not used in business shall be listed and assessed in the taxing district where kept. Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides. All other taxable property shall be listed and assessed in the municipal corporation in which the owner resides, or, if the owner resides outside a municipal corporation, then in the county in which he resides, excepting as otherwise provided in this chapter. Whenever, under any provisions of this chapter, taxable property, required by this section to be listed and assessed in the taxing district or county in which the owner thereof resides, is required to be listed by a fiduciary, such property shall be listed and assessed by such fiduciary in the taxing

district or county in which such fiduciary resides, or, in the case of joint fiduciaries, in which either such fiduciary resides; but such property belonging to the estate of a deceased resident of this state shall be listed and assessed in the taxing district or county in which he resided at the time of his death regardless of the residence of his executors, administrators or personal representatives, and such property belonging to a ward, minor, insane person, or beneficiary of a trust, residing in this state, title, custody or possession of which is vested in a non-resident fiduciary, shall be listed and assessed in the taxing district or county in which such ward, minor, insane person or beneficiary resides."

Section 5378, General Code of Ohio:

"A corporation having taxable property required to be listed in more than one county shall make a combined return to the commission, listing therein all its taxable property in this state, conformably to all the provisions of this chapter, but it shall not assign its property of the kinds mentioned in section 5328-1 of the General Code, to any particular taxing district or districts, or county or counties. The commission shall assess the personal property of such corporation in the several taxing districts in which it is required by this chapter to be assessed, and shall issue assessment certificates therefor to the proper county auditors at the time and in the manner required by this chapter. All other property of such corporation, required to be so listed, shall be entered on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state and taxed under section 5638-1 of the General Code. The commission shall assess all such other property of each such corporation and, on or before the third Monday of May, annually, shall certify the total value or amount of each kind or class thereof, to the auditor of state who shall enter same on the intangible property tax list in his office in the manner provided in chapter four of this title. Excepting as otherwise expressly provided in this section, all

the provisions of this chapter shall apply to and govern such corporation, its proper officers and representatives, the commission and the county auditor with respect to all proceedings in the assessment of the property of such corporation."

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

THE HOOVEN & ALLISON CO.,

An Ohio corporation,

Petitioner,

vs.

WILLIAM S. EVATT,

Tax Commissioner of Ohio,

Respondent.

REPLY BRIEF OF PETITIONER.

LUTHER DAY,

FREDERICK WOODBRIDGE,

CURTIS C. WILLIAMS, JR.,

MARCUS MCCALLISTER,

Counsel for Petitioner.

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REPLY BRIEF OF PETITIONER.

I.

SUMMARY OF REBUTTAL.

1. In his statement of facts, respondent states that the fibers in question were purchased *through* New York brokers who were agents for the foreign sellers. The contracts of purchase and the sales of the fibers were, therefore, admittedly between the petitioner and the foreign seller.

2. Respondent concedes that the contractual provisions providing for payment to be made on delivery on the docks at destination with title to remain in the seller until the goods were fully paid for were somewhat modified in practice and that the contract price was not paid by petitioner until ten or fifteen days after the goods arrived in Xenia. This indicates, as was testified to by petitioner's witness, that the sales were credit sales, and that the written formal contracts do not accurately reflect the agreements of the parties.

3. The respondent's claim that petitioner is not the importer, based upon the argument and assumption of

respondent that the sale of and the title to the fibers in question passed to petitioner at some unspecified point in the United States, is unsupported by the authorities and not consistent with the proper application of the law in this case. An importer may be (a) one upon whom rests the risk of loss of the goods at the time such person brings them into this country, or (b) one who has purchased the goods abroad and caused them to be brought into this country under a contract of purchase whether or not legal title is vested in him when they are so brought in. The sale of these goods took place at least as early as the moment the goods were appropriated to the contract in the foreign port. At that point some interest in the goods passed to the purchaser—the petitioner in this case. There is no requirement, within the imports clause of the Constitution, that legal title to the fibers in question must pass to the petitioner before the goods reach this country in order to constitute it the importer and thus render the goods immune from state property taxation as imports. If the location of legal title to the fibers in question be material, then the prize law cases hold that in analogous situations title to ~~or~~ ownership of goods passed in the foreign port of shipment to the buyer who was located in the local port. The same result should follow where other public law questions are involved.

4. The statement of respondent that the goods were not earmarked for the petitioner and were not appropriated to the contract in the foreign country is not in accord with the stipulated facts and petitioner's uncontradicted evidence.

5. The cases cited by respondent to show that in a contract to deliver goods title does not pass until delivery of the goods are distinguishable from the case at bar in that (a) they were between the parties to the contract; (b) they dealt with applications of the technical requirements of the law of sales; (c) either something remained

to be done to the goods by the seller or there were breaches of express warranties or no intention of the parties appeared to overcome the presumption that the written contract expressed their only intentions; and (d) no constitutional questions were involved.

6. The statement that the petitioner has made some use of the fibers in question by merely holding them in the original package in its raw material warehouses until such time as they would be needed in its manufacturing processes is in conflict with the decided cases.

7. Goods imported from the Philippines are imports within the meaning of that term as used in Article I, Section 10 of the United States Constitution.

II.

COMMENTS ON RESPONDENT'S STATEMENT OF FACTS.

In his brief respondent accepts the petitioner's statement of facts generally but makes certain additions thereto. In these additions the respondent states that the fibers were purchased *through* New York brokers who acted as agents for the producers in the Philippine Islands and in foreign countries. He further states that written contracts, the forms of which are contained in the Record, were signed by the petitioner and the brokers on behalf of the producers (R. 40). It seems now that respondent does not question the fact that the contracts to purchase the fibers were between the petitioner and the foreign sellers and that the fibers were not purchased from the New York brokers as the Supreme Court of Ohio assumed in its majority decision (R. 108).

The respondent in his statement of facts states that the terms of the contract providing for payment to be made on the delivery of the goods at destination and "title to remain in seller until goods are fully paid for" were modified somewhat in practice because the petitioner was not re-

quired to pay until ten or fifteen days after the goods finally arrived in Xenia, Ohio. No contention is made by respondent that title to the goods was in the foreign seller after the fibers were shipped from the port of entry to the petitioner at Xenia, Ohio, on a straight bill of lading. It seems to follow from the respondent's own statement of facts therefore that the modification of the written form contracts by long continued usage between the parties modified not only the requirement as to cash payment on the dock, but modified the title retention provision as well and presumably also modified the duty of delivery on the docks for these provisions seem to be inextricably interwoven.

III.

ARGUMENT.

A. Petitioner Was the Importer of the Fibers in Question.

The claim that petitioner was not the importer based upon the location of legal title is unsupported by the authorities. Respondent states (Resp. B. 11)¹ that petitioner contends that *title* to the fibers passed to it before the fibers reached the United States. Apparently he means *legal* title. Actually what this petitioner has contended is that the *sale* of the fibers took place when the goods were appropriated to the contract and shipped from the foreign port, and that beneficial title, at least, then passed to it.

Norfolk and Western Railway Company v. Sims, 131 U. S. 441 (1903) commented on in petitioner's brief, page 27, clearly supports this conclusion. The only question facing this Court in the *Sims* case was whether the sale took place in North Carolina. This Court did not decide that title did not pass until the c.o.d. charges were paid and the goods delivered and no such decision was necessary.

¹ Respondent's brief is hereafter referred to as "Resp. B." Petitioner's principal brief is hereafter referred to as "Petr. B."

to the decision of the case. Justice Brown merely said that title may not have passed till payment of the c.o.d. and freight charges by the buyer. His opinion does not indicate that he meant any more than that the mere naked legal title for security purposes was retained by the seller. As the sale occurred in Illinois some interest in the property passed to the purchaser at that moment. Petitioner maintains that at least some interest in the fibers passed to it at the latest when they were appropriated to the contract in the foreign port of shipment. Such was the intention of the parties and that is controlling. (1 *Williston, Sales* (2d ed. 1924) secs. 260, 262.)²

To show that petitioner is not the importer, respondent in his brief relies almost entirely upon the argument that title to the fibers did not pass to the petitioner until after the goods had arrived in the United States, but whether that occurred at the port of entry or at Xenia, he does not say. In this connection he apparently relies upon the fact that the fibers were sold somewhere in the United States after their arrival and therefore as a consequence of that sale title then passed to petitioner. There are several answers to this contention.

1. On page 4 of his brief respondent states that the provision of the contract relating to delivery on the docks with title remaining in the seller until the goods are fully paid for are modified in practice. If they are modified in practice with reference to the time of payment, they are necessarily modified with reference to retention of title.

² The suit at bar is not between the parties to the contract of sale and purchase. Oral evidence in such case is clearly competent to show the real agreement between the parties, even though such evidence varies the terms of the written instrument. *Bowman v. Tax Commission of Ohio*, 135 O. S. 295, 20 N. E. (2d) 916 (1939). This is stated to be the general rule. 9 *Wigmore, Evidence* (3d ed., 1940) sec. 2446. Cf. *Livingston v. Heck*, 122 Ia. 74, 94 N. W. 1098 (1903).

for these provisions are inextricably interwoven. He apparently agrees that these are credit sales.

2. In the interpretation of the Constitution, technical diversities of the law of sales should not stand in the way of construing constitutional rights and immunities; and under *Norfolk and Western Railway Company v. Sims, supra*, it is clear that the sale took place in the foreign port of origin.

3. The respondent fails to mention *The Merrimack*, 8 Cranch, 12 U. S. 317 (1817) (Petr. B. 30) and *The Odessa* [1916] (1 A. C. 145, 154) (Petr. B. 31) which held that for prize law purposes, and therefore for public law purposes, title or ownership in the goods had passed in the foreign port to the local buyer in situations closely analogous to the case at bar.

4. As reported *Low v. Austin*, 80 U. S. 29 (1871) (discussed in Petr. B. 16) shows that the bottled wines there sought to be taxed by the State of California were shipped on consignment from a foreign country to Low, a commission merchant in San Francisco. This Court held the wines immune from ordinary property taxation on the ground that they were imports still in the hands of the importer. Low did not, however, have legal title, yet he was held to be the importer.³ Respondent fails to mention this case in his brief.

5. Neither in *Waring v. City of Mobile* (Petr. B. 24) nor in *Low v. Austin, supra*, (Petr. B. 35) is there any statement that title to imported goods must pass to the taxpayer in the foreign country or before the goods reach the United States in order to make him the importer within the meaning of Article I, Section 10 of the Constitution.

Factually, the case at bar shows that in many instances the fibers in question were actually grown in the foreign

³ In a shipment on consignment the legal title normally remains in the consignor: *Pocahontas Guano Co. v. Smith*, 122 Va. 318, 94 S. E. 769 (1917).

countries for Hooven & Allison. It is clear from the evidence that not a single shipment of fibers would have been made from the foreign port to the United States without the pre-existing orders given by petitioner, The Hooven & Allison Co., to the foreign producers. The only party, and the party solely responsible for bringing the goods into this country is Hooven & Allison. In many cases (R. 46) it even chooses the boat line on which the goods are brought in.

Respondent states in his brief that the bales of fiber were not marked in such a way as to show them to have been appropriated to the specific contracts involved (Resp. B. 12-13). Instead, he further states that the marks indicated the type of fiber in the bale or the name of the estate upon which it was produced. From this he concludes that the contracts were executory until the fibers arrived in the United States, inspected, unloaded and weighed. This conclusion is unsound and based upon an erroneous view of the uncontradicted evidence.

The declaration itself constitutes an appropriation of the goods to the contract. In the case at bar the declarations show the approximate number of bales of fibers and the boat on which the bales are shipped (R. 40, 69). One broker stated that "when shipment is made by our principals from the Netherlands East Indies, they cable us a declaration, that is advice that shipment of such and such a contract has been made, and we in turn make formal declaration to our buyer, in this case, Hooven & Allison. This declaration actually serves to appropriate such lot of goods on the particular steamer for Hooven & Allison." (R. 77.) Another broker stated "when the declaration is made it bears a definite contract number and date and therefore serves to indicate the fulfillment of the contract in due course." (R. 82.) (To the same effect R. 72, 85, 86.) (Cf. *Produce Brokers Company, Ltd. v. Olympia Oil & Cake*

Co., Ltd., [1917] 1 K. B. 320 (Ct. of App. 1916); *Clark v. Cox, McEuen & Co.*, [1921] 1 K. B. 139 (Ct. of App. 1919).⁴

In addition to the appropriation of the goods to the contract by the declaration the undisputed testimony of petitioner's witness shows that in practically all instances there is an actual marking of the bales to identify them with certain contracts. (R. 40, 44.) All fibers sold by Stein, Hall & Co. contain a number on each bale which corresponds with a series of numbers stipulated on the ocean bill of lading and the invoice, thereby identifying each shipment and tying it up with a respective contract. (R. 76.) The same is true of two other brokers. (R. 81, 85.) It seems clear therefore that each shipment of fibers from a foreign port is definitely appropriated to a specific contract with Hooven & Allison.

In *Westmoreland Coal Company v. Syracuse Lighting Company*, 145 N. Y. S. 420, 159 App. Div. 323 (1913) relied upon by respondent, the contract required delivery of the coal "along side Syracuse Lighting Company's dock at Syracuse, N. Y. as heretofore." (Italics added.) By a divided court it was held that title to the coal did not pass until such time as the canal boats were along side the defendant's dock. Apparently the majority of the court were unable to find either a course of conduct between the parties or an intention between them which would vary to any extent the written agreement. The court therefore felt that the presumption was that the title would not pass before delivery in the absence of any proof of intention to the contrary. The case is merely authority for the principle that in a suit between the parties to a contract, absent any other evidence of intention, the written words of the

⁴ In the case at bar the sellers appeared to furnish this declaration not pursuant to specific requirement of the contract, but rather through long continued usage or custom of the trade. For the possible purposes of the declaration in addition to appropriating the goods to the contract see 2 *Williston, Sales* (2d ed. 1924) sec. 459a.

contract will supply the intention of the parties as to the time when title shall pass.

As pointed out previously (Petr. B. 23 *et seq.*) it does not seem material for the purpose of this case to decide when title to the fibers did pass to petitioner, but if it should become material, then it seems that at least a beneficial interest in the fibers passed to petitioner upon their appropriation to the contract in the foreign port. In addition, there is sound authority for holding that ownership or some species of title for public law purposes passed to the petitioner at the same time. (*The Merrimack, supra; Low v. Austin, supra.*) In *The Odessa*, [1916] 1 A. C. 145, 154 (Privy Council, 1915) it was held that nitrate shipped from Chile pursuant to an order from a German national in Germany but consigned to an English agent in England who paid the draft and took up the shipping documents was German property under prize law. The court said at page 154:

“ * * * Thus it has come about that in determining the national character of the thing seized the Courts in this country have taken ownership as the criterion, meaning by ownership the property or dominium as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. * * * ”

It would seem that the custom of the fiber dealers and their views of the contracts involved should weigh heavily in the Court's determination of this case. The House of Lords in England held that the English courts should follow the custom of dealers importing soya beans from the far East in construing their contracts. *Produce Brokers Company, Ltd. v. Olympia Oil and Cake Company, Ltd.* [1916] 1 A. C. 314 (House of Lords, 1915); same case on remand and rehearing, [1917] 1 K. B. 320 (Court of Appeals, 1916); in which Scrutton, *L. J.*, said at pp. 931-932:

"* * * I think there is always a satisfaction when the Courts construe a business document in the way in which business men themselves construe it."

See also *Clark v. Cox, McEuen & Co.* [1921] 1 K. B. 139 (Court of Appeals, 1919).⁵

The respondent also relies on *Gordon v. American Tankers Corp.* 286 Mass. 349, 191 N. E. 51 (1934). In that case the question of delivery of the goods by the plaintiff was not important because the contract was single, for a

⁵ In *MacEuan, Overseas Trade and Export Practice* (London, 1938) the author in commenting on the sale of primary products in world markets says that while some goods are sold through exchanges and public auctions, such products as are incapable of standardization are sold through private sale. He further said:

"* * * In London such products as rubber, tobaccos, copra, coconut oil, gums and drugs are sold almost exclusively by private treaty.

"The transactions between buyers and sellers are not necessarily effected through brokers, but the bulk of the business is done that way rather than by direct contact. Though buyers and sellers dealing together through brokers are not bound down to set conditions, as in the other more highly developed marketing organizations, different trades have their own customs and in many cases standard form of contracts are in use. But, in the main, business by private sale is transacted according to the 'custom of the trade,' and in the absence of any comprehensive contract of sale disputes are settled on that basis. It is therefore necessary to study the customs of each trade in order to become fully acquainted with the basis upon which business is to be transacted."

lump sum, and title to all the goods passed or no title to any of the goods passed. The seller represented that all the goods were on the dock when in fact part of them were not. This representation was equivalent to a warranty and was breached. The goods were purchased as being on the buyer's wharf and were not there. The court stated that there was a mutual mistake of fact which was a material part and of the essence of the contract. Therefore the buyer was entitled to a rescission of the contract and the recovery back of the purchase price paid.

The balance of the cases cited on pages 14 and 15 of respondent's brief fall into six groups. Those in which the intention of the parties was clear that title should not pass until the goods were at a specific location; those in which the delivery of the goods and the payment of the purchase price were to be simultaneous acts; those in which the seller still had to do something more to the goods to prepare them for a sale; those in which there were express warranties; those in which there was a large mass of goods the specific portion of which was not appropriated to the contract; and those in which the Alabama court rigidly enforced a statute relating to the sale of fertilizer in Alabama.

It is well settled that the question as to when title passes is one of intention, even where the goods are to be delivered. "Slight evidence, however, is accepted as sufficient to show that title passes immediately on the sale, though the buyer is to make delivery." (1 *Benjamin, Sales* (Sixth American Edition, 1889) Section 325 *et seq.*)⁶

⁶ In discussing this general proposition, Professor Williston says in part: "The contract specified that one party or the other is to pay the freight. This tends to prove the intention of the parties in regard to the matter. If the buyer is to pay the freight, it is a reasonable supposition that he does so because the goods became his at the point of shipment and the carrier is his agent in transporting them." 1 *Williston, Sales* (2d ed. 1924) sec. 280 at

(Continued on next page)

**B. The Fibers in Question had not Lost their Immunity
from State Property Taxation.**

Respondent argues that the petitioner made such a use of the fibers in question, while they were still stored in its raw material warehouse, as to subject them to state taxation. He also argues that they are not imported for sale and so are not imports within the constitutional meaning of that term.

To support this argument respondent relies upon *Brown v. Maryland* which involved only imports of materials for the purpose of sale. *Woodruff v. Parham*, 8 Wall. 123 (Resp. B. 16) and the cases cited by respondent on page 17 of his brief are interstate commerce cases or otherwise did not involve imports and did not require for their decision any reference to imports. The same is true of *Wynne v. Wright*, 18 N. C. 19 (Resp. B. 18). In all these cases, however, the goods involved were intended for sale and not manufacture.

In *Tres Ritos Ranch Co. v. Abbott*, 44 N. Mex. 556; 105 P. (2d) 1070 (1940) (Resp. B. 19) cattle were imported into New Mexico from old Mexico and put on a ranch where the taxpayer at once began feeding and fattening them for market. During the time they were held on the ranch, sometimes as long as two years, they gained in weight and produced many young. The taxpayer claimed the cattle immune from state property taxation on the theory that they were imports and the very large ranch, which consisted of one-half million acres of open range on which they were kept, had been upon application of the taxpayer declared to be a bonded warehouse. The court said that the

(Continued from preceding page)

p. 594. In the case at bar one of the elements making up the purchase price is the normal ocean freight from the foreign port to the port of entry in the United States. Any variation in freight rates is for the buyer's account. (R. 58, 59.) Petitioner—the buyer, likewise pays the freight from the port of entry to Xenia. (R. 59, 69, 76.)

taxpayer had so used the cattle for his own purposes by feeding and fattening them, by breeding them with domestic sires, and getting them ready for market as to cause them to lose their immunity from state property taxation,—in effect the taxpayer had “processed” them. There was also a question raised as to what constituted the “original package” but such question is not before this Court in this case.

As pointed out in petitioner’s brief, pages 39 *et seq.*, the case of *Gulf Fisheries Company v. MacInerney*, 276 U.S. 124 (1920) and *McGoldrick v. Gulf Oil Company*, 209 U. S. 414, 423 (1940) indicated that goods brought into the United States for processing purposes may be imports. *Mexican Petroleum Corporation of Louisiana v. Louisiana Tax Commission*, 173 La. 604; 138 So. 117 (1931) is a square holding that goods brought into this country for processing and then sale are imports within the meaning of the imports clause of the United State Constitution. Compare also *Southern Pacific Railway Company v. City of Colerico*, 288 Fed. 634 (District Court S. D. Cal., 1923). It is significant that respondent fails to mention these cases.

The statement of respondent therefore (Resp. B. 20) that “• • • when the imported goods reached the plant, they were immediately used in that they were essential to the continuous daily operation of petitioner’s plant” is entirely unsupported, factually or legally. The undisputed facts show that no use whatever is made of the fibers until they are started in the process of manufacture. Merely holding the fibers in a raw material warehouse until they are started through the manufacturing process can hardly be said to be a “use” of the goods.

Nothing in the facts show that these fibers are mingled with other raw material used by the petitioner. None of the fibers in question was produced in this country. The undisputed testimony shows that the fibers in question were kept in the original bales until such time as they were

broken for processing. Assuming that they may have been placed under the same roof with other/raw materials but in a different room, there would still be no commingling of the fibers with local property in such manner as to cause them to lose any immunity that they may otherwise have from state taxation. *Southern Pacific Railway Company v. City of Calxico, supra.*

C. The Fibers Brought into Ohio from the Philippine Islands were Imports within the Constitutional Meaning of that Term.

Respondent in its brief, pages 38 *et seq.*, has analyzed and commented upon all of the important cases dealing with the status of the Philippine Islands. Respondent cites and relies upon *Dant & Russell v. Board of Supervisors*, 21 Cal. (2d) 534, 133 P. (2d) 817, cert. den. 320 U. S. 735 (1943). In its decision of that case the Supreme Court of California relied heavily upon the *Insular* cases and the *Fourteen Diamond Rings* case. We shall not repeat here our analysis and discussion of those cases as appears in our principal brief. It is submitted, however, that the case of *Dant & Russell* is incorrectly decided and is no precedent for this Court to follow.

It is submitted therefore that the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

**THE HOOVEN & ALLISON CO., AN OHIO
CORPORATION,**

Petitioner,

• vs. •

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF OF RESPONDENT.

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IN THE

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OCTOBER TERM, 1944.

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THE HOOVEN & ALLISON CO., AN OHIO
CORPORATION,

Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,

Respondent.

BRIEF OF RESPONDENT

OPINIONS DELIVERED IN THE COURTS BELOW.

This matter was originally presented to the Board of Tax Appeals of the department of taxation of the state of Ohio. Its opinion dated March 19, 1943, sustaining the assessments made by the tax commissioner, is unofficially re-

ported in 26 Ohio Opinions, 25. On appeal to the Supreme Court of Ohio, the decision of the Board of Tax Appeals was affirmed on November 24, 1943, the opinion being officially reported in 142 O. S., 235, and also reported in 51 N. E. (2d), 723. These opinions are reprinted in the Record at pages 94 and 104, respectively.

STATEMENT OF THE CASE.

A. The Case Below.

The progress of the case below is correctly set forth in the petitioner's brief and for that reason will not be restated herein.

B. Statement of the Facts.

While the facts have been set forth in elaborate detail in the petitioner's brief and generally are correctly stated therein, it appears appropriate to include in this brief the following summary of the facts for the purpose of calling attention to certain matters apparently deemed inconsequential by the petitioner.

The Hooven & Allison Company, the petitioner herein, is an Ohio corporation which was organized in 1888, having its principal place of business at Xenia, Ohio. It is engaged in the manufacture of cordage, twine, packing and oakum binder twine. In its manufacturing processes during the years in question the petitioner used large quantities of fibers, such as hemp, sisal, abaca, istle, and the like. These fibers were produced principally in foreign countries and the Philippines.

As concerns the present review, the petitioner made inter-county returns of its personal and intangible property

for the tax years 1938, 1939 and 1940. Upon audit of these returns, the tax commissioner determined that the petitioner had failed to list certain fibers which it owned and held in its warehouses preparatory to running the same through its mills. The commissioner corrected these returns by adding to the raw material inventories \$467,530 for 1938, \$274,830 for 1939, and \$221,790 for 1940. The petitioner's appeal and the present review is limited to the validity of these additions.

By stipulation (Ex. 2, R. 89), it is agreed that the added raw material inventories consisted of fibers contained in their original packages which were brought into the United States from foreign countries and from the Philippine Islands. It is stipulated that these fibers came from the sources and had values as follows:

Year	Source	Value
1938	Countries other than the Philippine Islands	\$410,030
1938	Philippine Islands	57,500
1939	Countries other than the Philippine Islands	225,080
1939	Philippine Islands	49,750
1940	Countries other than the Philippine Islands	191,990
1940	Philippine Islands	29,800

These fibers were purchased through New York brokers who acted as agents for the producers in the Philippine Islands and in foreign countries. Written purchase contracts (R. 70A to 70D, 74A, 80A, 84A to 84D, 88A and 88B) were signed by the petitioner and the brokers on behalf of the producers (R. 40), stating the type and the approximate quantity of fibers the petitioner contracted to buy and the price to be paid. All of these contracts were "landed contracts" (R. 41, 48, 58, 59, 68 and 82), that is, the sellers

were required as a part of their contracts to deliver the goods f. o. b. on specified docks in the United States. There were no C. I. F. contracts (R. 61). The contracts provided that payments should be made on delivery on the docks at destination and "title to remain in seller until goods are fully paid for." In practice, however, such provisions were somewhat modified, for upon arrival the brokers advanced the contract price less their commissions and subsequently collected from the petitioner when the goods arrived at Xenia, Ohio, or within ten or fifteen days thereafter.

While en route to this country, the fibers were insured by the sellers who paid the premiums on marine insurance and generally paid one-half per cent of the insured value of war risk insurance. The sellers were the beneficiaries of such policies, although provision was frequently made for the protection of the interests of the brokers and the drawee consignee banks (R. 41, 69, 72, 77 and 86). The petitioner was required to pay any excess for war risk insurance and for any increased value insurance, if it desired the latter.

In shipping the fibers, the sellers either consigned the same to themselves, the brokers or a bank with a bill of lading and draft attached (R. 68, 71, 76, 81, 85). The brokers were notified of such shipments and, in turn, they passed this information on to the petitioner. Upon arrival at the port of entry, the brokers cleared the goods through the customs, supervised the unloading and weighing, made inspections for the petitioner and arranged for shipments to the petitioner's factory at Xenia, Ohio (R. 61, 69, 71, 76, 82, 86).

When the goods arrived in Xenia, the bales were placed in the petitioner's warehouses and left there in their original packages until the petitioner started them through its mills, at which time the bales were removed from the ware-

houses, the original packages broken and processing was actually started on the fibers. Simultaneously, the petitioner made appropriate entries on its books whereby such bales were transferred from its raw materials account to the goods in process account. Upon completion of the processing, another transfer was made on its books to the finished goods account (R. 43).

All of the fibers purchased by the petitioner were purchased for the sole purpose of meeting its manufacturing needs. No fibers were ever purchased for resale (R. 47). Having in mind that it took from three to six months for deliveries to be made after orders were placed, the petitioner tried to keep its business running "with a minimum working inventory" (R. 42). The petitioner attempted "to keep a backlog for that" (R. 42). Hence only such quantities of fibers were purchased and placed in petitioner's warehouses as were deemed necessary to assure the constant operation of its plant.

As stated by the petitioner, the questions presented to this court are, within the purview of Article I, Section 10, Clause 2, of the Constitution of the United States: 1. Was the petitioner the importer? 2. If so, had the fibers in question lost their character as imports when assessed for state property taxation? 3. Were those fibers brought into Ohio from the Philippine Islands ever imports?

SUMMARY OF ARGUMENT.

1. The contracts under which the petitioner bought fibers, including such modifications thereof as were developed in practice between the parties, show that the producers were required to deliver specified types and qualities of fibers to the petitioner on named United States docks; that such fibers were shipped under direction of the sellers, except that the petitioner occasionally expressed a desire that certain steamship lines be used; that the bills of lading with draft attached named the sellers, the sellers' brokers or their drawee banks as the consignees; that the cargoes were insured against loss at sea by the sellers or their brokers with loss payable to the sellers, the brokers and their drawee banks, as their interests might appear; and that the contracts provided that title should remain in the sellers until the goods were paid for by the petitioner, but this provision was modified in practice by the brokers advancing the contract price less commissions to the sellers and being paid by the petitioner within ten or fifteen days after the fibers arrived in Xenia. Under these conditions, it is contended that title has passed in the United States thereby causing the fibers to become mixed with the mass of domestic property and the immunity from state taxation lost.

2. The petitioner is a manufacturer and, as such, used quantities of imported fibers. It took from three to six months after an order was placed to get deliveries of such fibers. In order to keep its plant in constant operation, it was necessary for the petitioner to keep a "backlog" or supply of fibers in its warehouses. The petitioner always operated its business "with a minimum working inventory" and never bought fibers for the purpose of sale. Under

these circumstances, it is contended that the petitioner has used the fibers just as truly as if it had broken the original packages and started them through its mills. By so using the fibers, even if it be the importer, the petitioner has exhausted the tax free privilege of the imports and they are thereafter to be considered as domestic property subject to state taxation.

3. "Imports" within the meaning of Article I, Section 10, Clause 2, of the Constitution of the United States are articles brought into this country from some foreign country. The Philippine Islands are United States territory. Hence, such portions of the fibers used by the petitioner as came from the islands were not imports and the state of Ohio was free to impose the questioned assessments.

ARGUMENT.

Questions Presented.

The petitioner, by its specifications of error, has presented three questions to this court for determination.

A. Under the facts presented, did the petitioner acquire title to the fibers in question after their arrival in the United States?

B. If it be assumed that the petitioner was the importer, did it use the fibers in question in its business in such manner as to have caused them to have lost their immunity from state taxation?

C. Were those fibers which were brought into Ohio from the Philippine Islands imports within the meaning of Article I, Section 10, Clause 2, of the Constitution of the United States?

SUMMARY OF PERTINENT OHIO STATUTES.

Since the petitioner in its brief and in its specifications of error raises only three questions, all of which are dependent upon the construction and intent of Article I, Section 10, Clause 2, of the Constitution of the United States, it appears to be conceded that if on tax listing day the fibers under consideration were not immune from state taxation, then the assessments were in all other respects correctly made. We therefore deem it sufficient to summarize briefly the Ohio statutes under which the challenged assessments were made.

The petitioner is a taxpayer as defined in Section 5366, General Code of Ohio, and as such is required by Sections 5367 and 5370, General Code of Ohio, to return annually

its taxable property. Since the petitioner had taxable property in more than one county, it was required by Section 5378, General Code of Ohio, to file a combined or inter-county return. (R. 4a to 31).

In its returns, the petitioner is required to list, and the tax commissioner is required to assess, all taxable property which, as provided in Section 5328, General Code of Ohio, includes "all personal property located and used in business in this state." The term "used in business" is defined in Section 5325-1, General Code of Ohio, which provides in part:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only."

The manner of listing raw materials by a manufacturer is found in Section 5385, General Code of Ohio, which reads:

"A person who purchases, receives or holds personal property, of any description, for the purpose of adding to the value thereof by manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, is a manufacturer, and, when he is required to return a statement of the amount of his personal property used in business, he shall include therein the average value estimated, as hereinafter provided, of all articles pur-

chased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto (separately listing finished products not kept or stored at the place of manufacture or at a warehouse in the same county therewith), which, from time to time, he has had on hand during the year next previous to listing day annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged."

The average value of such materials is computed as provided in Section 5386, General Code of Ohio, which, so far as pertinent, reads:

"Such average value shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer, on the last business day of each month the manufacturer was engaged in business during the year; adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year. Such result shall be the average value to be listed. * * *

From the foregoing, it appears that it was the duty of the petitioner to have included in its returns for 1938, 1939 and 1940 the average value of the raw materials which it held in its Ohio warehouses during the calendar years 1937, 1938 and 1939.

The Petitioner, Having Acquired Title to the Fibers in Question After Their Arrival in the United States, Was Not the Importer.

Article I, Section 10, Clause 2, of the Constitution of the United States, prohibits the states from levying any taxes on imported articles so long as such articles retain the character of imports. It has been firmly established, however, that when such articles are sold after arriving in the United States, they lose their character as imports. *Brown v. Maryland*, 12 Wheat., 419; *Waring v. Mayor, Etc., of Mobile*, 8 Wall., 110. We must therefore conclude that if the petitioner acquired title to the questioned fibers after their arrival in the United States the assessments should be sustained.

The petitioner contends that although the contract for the purchase of fibers all required delivery by the sellers at specified ports in the United States, title passed before the fibers reached the United States. Several cases are discussed by the petitioner in support of this contention. Without attempting to analyze these cases separately, it may be said that in each case the facts are easily distinguished from the instant case. For example, in *United States v. Andrews*, 207 U. S., 229, while the term "f. o. b. Manila" was used, the price was fixed as the price in Washington, D. C., plus freight from New York. The court found that the words "f. o. b. Manila" were therefore not used in their ordinary commercial sense (p. 241). The goods were delivered to a carrier designated by the consignee, the latter choosing the route. The bill of lading was to the consignee or order. It also appears that there was no reservation of title by the consignor (pp. 240 and 241). In our present case, the petitioner's contracts all

required delivery to be made on United States docks by the sellers. Title was specifically reserved in the sellers. While the petitioner sometimes indicated a preference of steamship lines, the evidence fails to show that there was any insistence upon such designation. Furthermore, the petitioner did not undertake to select the route. The bills of lading were to the sellers, their brokers and sometimes included a drawee bank. Under such conditions as we shall subsequently show, title remains in the vendor at least until delivery is made. The petitioner also relied upon *Norfolk and Western Railway Company v. Sims*, 191 U. S., 441. In the opinion in that case it was conceded "that the property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier."

Until such time as title to the goods passed to the petitioner, there was nothing more than a contract of sale. Sales were not made until the sellers delivered the goods on the specified United States docks. The completion of such sales after the goods had arrived in the United States terminated the immunity from state taxation. *Brown v. Maryland*, 12 Wheat, 419; *Waring v. Mayor, Etc., of Mobile*, 8 Wall., 110. The time when title passes must be ascertained from the contracts and surrounding circumstances. The petitioner's contracts do not call for the sale of specific goods. Only the type, quality and quantity of fibers are specified. Such fibers might have been produced by the sellers after the contracts were signed, or they might have been taken from a larger stock then or subsequently acquired by the sellers, or the sellers might have purchased the proper type and quality of fibers to fulfill their contracts with the petitioner. Although the bales

were marked, such marks did not show them to have been appropriated to the contract. Instead, they indicated the type of fiber in the bale or the name of the estate upon which it was produced. The contracts were therefore executory until the fibers arrived in the United States, were inspected by the brokers for the petitioner and unloaded at the docks and weighed.

Under both the common law and the Uniform Sales Acts, which, in general, follow the common law, if the contract requires the seller to deliver the goods f. o. b. at a specified point, title does not pass until such delivery is made.

The above principle was very clearly expressed in the case of *Westmoreland Coal Company v. Syracuse Lighting Company*, 145 N. Y. S., 420, 159 App. Div., 323.¹ In this case plaintiff had sold coal to the defendant, plaintiff agreeing to deliver the same on defendant's dock. The coal was loaded on barges and taken to the vicinity of defendant's dock awaiting the departure of other barges then unloading at the dock. While thus awaiting an opportunity to unload, the coal and barges were lost in a storm. It was contended that when the coal was loaded on the barges it was thereby appropriated to the contract and was thereafter at the buyer's risk. The court held that this may have been an appropriation by the seller, but until it made

¹ In the case of *Westmoreland Coal Company v. Syracuse Lighting Company*, 145 N. Y. S., 420, 423, 159 App. Div., 323, it was said in the opinion:

"It is suggested that when plaintiff placed the coal on these boats there was an appropriation of it in fulfillment pro tanto of the executory contract for delivery of coal. While this may have been an actual appropriation by plaintiff to that end, yet it did not complete what it had agreed to do before title passed to the defendant. Delivery of the coal was as much a part of its duty as actual selection and appropriation of it. Delivery of the coal at the place specified in the contract was required to be made, and then only would the defendant's assent to such appropriation in part fulfillment of the contract be established. Delivery was not made. Therefore title had not passed to defendant."

delivery as agreed there could be no assent to such appropriation by the buyer. Delivery as specified, it was said, was as much a part of the seller's duty as appropriation to the contract, and since there was no delivery, title did not pass.

In the case of *Gordon v. American Tankers Corp.*, 286 Mass., 349, 191 N. E., 51, propeller blades and heavy machinery were sold to be delivered on seller's wharf. Only part of the propeller blades had been placed on the wharf when the wharf collapsed. The court held that the contract being for the sale of specified articles for a single sum was entire and not separable. Since it required delivery by the plaintiff, only part of which had been made at the time of the loss, title had not passed.

Other courts have reached the same conclusion.

Yockey v. Norn, 101 Mich., 193, 60 N. W., 685;

Neimyer Lumber Co. v. B. & M. R. R. Company, 54 Neb., 321, 75 N. W., 670;

Cross v. State, 75 Ark., 522, 87 S. W., 1026;

Quisenberry v. Rucker, 124 S. W., 274 (Kentucky);

Pfah v. Porter, 23 Calif. App., 59, 137 Pac., 44;

Zank v. Jones, 178 Wis., 445;

Sidford & Greene, Inc., v. Wehmeyer Coal Company, 133 Misc., 22, 230 N. Y. S., 611;

Hettrick Manufacturing Company v. Seere, 235 Mich., 306, 209 N. W., 97;

Garran, Inc., v. N. Y. Central & H. R. R., 210 Mass., 275, 96 N. E., 717;

Allen v. Wolf River Lumber Company, 169 Wis., 253, 127 N. W., 158;

Brown v. Adair, 104 Ala., 652, 16 So., 439;

Alabama National Bank v. Parker & Company, 146 Ala., 513, 40 So., 987;

Tripp v. Wade, 82 Fla., 325, 89 So., 870;

Faulkner v. Town of South Boston, 141 Va., 517, 127 S. E., 380;

National Bank v. Dayton, 102 U. S., 59.

Ormsbee v. Machir, 20 O. S., 295;

B. & O. S. W. Ry. Co. v. Good, et al., 82 O. S., 278;

Rehr v. Lumber Company, 110 O. S., 208.

The foregoing conclusions receive substantial confirmation from the fact that the foreign sellers took out marine insurance on the fibers purchased by the petitioner, paid the premiums thereon and were named as beneficiaries.

Stearns v. Grand Trunk R. R. Company, 156 Mich., 145, 120 N. W., 572;

Collins v. Oliver, 299 Pa., 372, 149 Atl., 647; and
Christian v. Moore, 252 S. W., 1116 (Tex.).

Since all of the petitioner's contracts were landed contracts requiring the sellers to deliver the fibers on docks in this country, it follows that title did not pass to the petitioner until after the goods had arrived in the United States.

Even if the Petitioner Were to be Regarded as an Importer, it Used the Fibers in Such Manner as to Make Them Subject to State Taxation.

At the time of the adoption of the Constitution and for many years thereafter, the United States was primarily an agricultural nation engaged in the production of raw materials. It did relatively little manufacturing. Manufactured articles and finished products were imported from foreign countries to supply the United States market. It was realized that some form of protection had to be given the central and western states to prevent the Atlantic seaboard states from subjecting imports and exports of the former to taxation. For example, on August 6, 1787, in a debate on a motion to amend a draft of the proposed constitution, James Madison said that "It would be unjust to the states whose produce was exported by their neighbors to leave it subject to tax by the latter."

In a meeting of the convention as a committee of the whole on August 28, 1787, Gouverneur Morris stated that he thought it was necessary to require the net receipts of all state duties and imposts to be for the use of the United States treasury in order to prevent the Atlantic states from endeavoring to tax the western states.

In *Brown v. Maryland*, 12 Wheat. 419, Chief Justice Marshall said (p. 440):

"Conceding to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interest, it cannot be conceded that each would respect the interest of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports.

This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation."

See also *Woodruff v. Parham*, 6 Wall. 123.

Such potential inequities led to the adoption of Article I, Section 10, Clause 2, of the Constitution of the United States, whereby the states relinquished the right to levy a property tax upon imports even though the imported property be physically located within the state on tax listing day.

It therefore appears that the object of the constitutional provision is to give the same price advantages to purchasers of imports in the inland states as are enjoyed by those in the seaboard states. This object of necessity has special application to sales to be made of imported articles. In *Brown v. Maryland*, 12 Wheat. 419, Chief Justice Mar

shall said that "The object of importation is sale; it constitutes the motive for paying the duties."

In *Mayor of the City of New York v. Miln*, 11 Peters, 102, it was said (p. 136) that sale is the object of all importation and that the right to import goods implies the privilege to sell the imported goods.

In *Bowman v. Chicago & Northwestern R. Company*, 125 U. S., 465, 499, it was said that the right of importation necessarily implied the right of the importer to sell the unbroken packages. The same conclusion was reached in *Rhodes v. State of Iowa*: 170 U. S., 412, 416.

In all the reported decisions we have been able to find dealing with the rights of the states to tax in any manner imported goods, the facts clearly disclose that the express object of the importation was sale. It appears to have been the view of the courts that such imports, while awaiting resale in their original packages in the hands of the importer, are not to be considered as having come to rest in this country, but are regarded as being temporarily held in storage pending further shipment or transfer of title. This was the view of Chief Justice Taney in the *License Cases*, 5 How., 504, 575.

In his opinion in the *License Cases*, 5 How., 504, at page 575 Chief Justice Taney said:

"The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the state in which they are imported. A great (perhaps the greater) part imported in some of the cities is not owned or brought in by citizens of the state, but by citizens of other states, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely in transit, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for state purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a state."

When imported articles have come to rest in a state and are not being held for sale, even though belonging to the importer and remaining in their original packages, it appears that such articles are not embraced in the provisions for immunity. This view finds substantial support in *Brown v. Maryland*, 12 Wheat., 419. In that case (p. 441), in answer to the question of how long imports continued to be such after their arrival in this country, it was said that the immunity continued until the importer had so acted upon the imported articles as to have caused them to become incorporated and mixed up with the mass of property in the country. It was then stated (p. 442) that while the imported articles remained the property of the importer in his warehouses in the original packages in which they were imported, taxation by the states was prohibited. In the paragraph that follows, however, it becomes plain that the court had reference to articles being held awaiting sale. On page 443 the court held that the importer has used the privilege he has purchased when he has mixed the imported articles with the common mass. The same observations, it was said, apply to plate, or other furniture used by the importer. Thus, the court recognized the difference between articles imported for sale and imported articles used by the importer, the latter being regarded as having come to rest and as being mixed with the mass of property within the state.

In *Wyne v. Wright*, 18 N. C., 19, the court recognized that imports became amalgamated with other goods of the

state by being withdrawn from the market as subjects of commerce and diverted to the private use of the importer.

In *Tres Ritos Ranch Company v. Abbott*, 44 N. Mex., 556, 105 Pac. (2d), 1070, it has been recognized that if the importer, while retaining the goods in original packages, makes use of such goods in his domestic business, such use may constitute a mingling with local property and state taxes may thereafter be levied.

In the case of *Baldwin v. Seelig*, 294 U. S., 511 (pp. 526 and 527), this court recognized that the original package doctrine is not an ultimate principle, but is only an illustration of a principle.

It has frequently been held that original packages may be broken by accident or for inspection purposes without losing the privilege of immunity.

Re McCallister, 51 Fed., 282;

United States v. Five Boxes of Asafoetida, 181 Fed., 561;

United States v. Nine Boxes of Asafoetida, 181 Fed., 568;

Wind v. Her, 93 Ia., 316, 61 N. W., 1001;

Greek-American Sponge Company v. Richardson Drug Company, 124 Wis., 469, 102 N. W., 888;

Vermont Farm Machine Company v. Hall, 80 Ore., 308, 156 Pac., 1073.

In *Wunne v. Wright*, 18 N. C., 19, the court, in analyzing the opinion in *Brown v. Maryland*, 12 Wheat., 419, concluded that the privileged status of imports ceased when they were mixed with or incorporated into the general mass of property in the state by a resale thereof; by breaking the original packages or if "he keep a particular article, as a piece of plate or jewelry, for his own use." Quoting from the opinion, it was said:

"But when thus mixed, the right of the importer does not pass to his assignee, nor does the former exemption from taxation on a first sale adhere to the goods upon a re-sale. Nay, although the importer continued to be the owner, the goods become amalgamated with the other goods of the state, by either being withdrawn from the market, as subjects of commerce, and diverted to his private use, or by being offered for sale in small parcels, or in a peculiar manner, as by auction, by hawking, or otherwise by retail."

These decisions are evidently based upon the principle that such goods are still to be regarded as being in transitu in intact condition.

The original package doctrine further fails in literal application when the imported articles are such that they can not be wrapped, such as, for example, lumber, oil, large animals and the like. This was distinctly recognized by Justice Daniel in his opinion in the *License Cases*, 5 How., 504, 612.*

The evidence in the instant case shows that the petitioner purchased fibers solely for its own use, never for sale. It was impracticable to buy fibers a bale at a time to meet the immediate needs of its mill. It took from three to six months to get delivery after an order was placed. The undisputed testimony shows that the petitioner did not carry any more inventory than was actually needed, but due to the uncertainty of deliveries, it attempted "to keep a back log for that." It attempted to operate "with a minimum working inventory" (R. 16). In other words, when the imported goods reached the plant they were immediately used, in that they were essential to the continuous daily operation of petitioner's plant.

* In the *License Cases*, 5 How., 504, Justice Daniel said in his opinion (p. 612):

"With regard to this phrase, 'broken up and mingled with the mass of property', so often appealed to with the view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity. With respect to the phrase above mentioned, it may be retorted, that a person may import a steam engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the general mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home."

Not only were the imported fibers immediately used to assure the steady, uninterrupted operation of the factory, but they were mingled with other raw material used by the petitioner. Some of the fibers were produced in this country, some in the Philippines and some had been imported from foreign countries, but all were placed in petitioner's raw material warehouses, which were used as hoppers or reservoirs to feed steadily petitioner's machinery. On the books they were also mingled. Three accounts were kept by petitioner under the captions of "raw material", "goods in process" and "finished goods." In the raw materials' account all raw materials were listed, including imported fibers. Such use of the imported goods, we believe, constitutes a mingling with local property causing the imported fibers to lose any immunities they may have had from state taxation.

Goods Brought Into Ohio from the Philippine Islands, Which Are United States Territories, Are Not Imports Within the Meaning of Article I, Section 10, Clause 2, of the Constitution of the United States.

The stipulation. (R. 89) shows that approximately sixteen and one-half percent of the fibers in question were produced in the Philippine Islands and shipped into Ohio. While articles brought from one state into another are sometimes loosely referred to as having been imported, the inhibition found in Article I, Section 10, Clause 2, of the Constitution of the United States is confined to goods that are brought into this country from a foreign country. Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat., 419, 437, said that imposts or duties on imports are customs or taxes levied on articles brought into a country. Articles

can only be brought into a country from a point without the country, in other words, from some foreign country.

In the case of *Woodruff v. Parham*, 8 Walk., 123; it was held that goods brought into one state from another state of the Union were not imports. From the reasoning employed, it appears that the result would have been the same if the goods had been shipped from any United States territory under the jurisdiction of Congress into one of the states. The term "imports" was clearly limited to those articles which were brought into the United States from a foreign country.

It has repeatedly been held that the term "imports" applies only to articles brought from foreign countries.

Howe Machine Company v. Gage, 100 U. S., 676;

Pittsburg & Southern Coal Company v. Louisiana, 156 U. S., 590, 600;

Patapsco Guano Company v. Board of Agriculture, 171 U. S., 345, 350; and

Cuyard Steamship Company v. Mellon, 262 U. S., 100, 122.

The petitioner suggests that the expression "brought into the United States" should be confined to articles brought into the forty-eight states themselves. As authority for this statement, there is cited an article from 12 Harv. L. Rev., 464 (1899), discussing the meaning of the term "United States" as used in the Constitution. Petitioner concludes that "an article is an import irrespective of the place of its origin so long as that place lies outside the territorial limits of the forty-eight states which compose the federal Union." If this be so, then products of Alaska, Porto Rico, Hawaii and even Washington, D. C. would be regarded as "imports" when shipped into one of the forty-eight states. Two years after the Harvard Law

Review article appeared, this court had before it, as stated at the outset of the opinion in the case of *DeLima v. Bidwell*, 182 U. S., 1, "the single question whether territory acquired by the United States by cession from a foreign power remains a 'foreign country' within the meaning of the tariff laws." The tariff laws in question were contained in the Tariff Act of July 24, 1897 (30 Stat. at L. 591, chap. 11). Duties were imposed upon articles imported from foreign countries. Ample authority for the enactment of the Tariff Act was contained in Article I, Section 10, Clause 2, of the Constitution of the United States, as construed by the Supreme Court in *Brown v. Maryland*, 12 Wheat., 419, and the several decisions thereafter. The court reached the conclusion that a "foreign country" was one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States. The island of Porto Rico, having been ceded to the United States by the treaty with Spain, was no longer a "foreign country" for the purpose of providing duties upon imports. The opinion reviews several other cases at length to show that mere military occupation and rule of a foreign territory are insufficient. Goods shipped therefrom continue to be imports until a treaty has been ratified.

This follows the decision in the case of *Cross v. Harrison*, 16 How., 164, wherein the territory of Upper California, now the state of California, following the treaty of peace was recognized as being territory of the United States to which all of its tariff laws applied and foreign goods were liable for import duties.

In the case of *Fleming v. Page*, 9 How., 603, it appears that during the war with Mexico the Port of Tampico was captured and occupied by the United States. Duties were

levied on goods which were shipped from this port to the United States. Plaintiffs sought to recover those duties claiming they had been illegally charged for the reason that when the goods were shipped, Tampico was subject to the sovereignty and dominion of the United States, hence, it was no longer part of a foreign country, and that, imports were levied only upon goods brought from a foreign state. The Court came to the conclusion that although Tampico had been occupied by the military authorities, it was occupied as the territory of a foreign hostile nation and was therefore a foreign port when this shipment was made. While it was held that the duties were properly levied, a strong inference arises that if the port of origin had been ceded territory, after the ratification of the peace treaty, such port would thereafter have been regarded as a domestic port. Similar conclusions were reached in *DeLima v. Bidwell*, 182 U. S., 1; *Dooley v. United States*, 182 U. S., 222, and *Faber v. United States*, 221 U. S., 649.

Prior to the Spanish American War, the Philippine Islands were Spanish territories. A treaty of peace was ratified on April 11, 1899, whereby the Philippine Islands and other territories were ceded to the United States. As has been previously shown, upon this ratification the Philippine Islands ceased to be a foreign country and became territory of the United States. As a part of the United States, goods shipped therefrom to Ohio are not goods brought into the United States from a foreign country. Consequently, they are not imports.

The above conclusion is fully supported by the case of *Fourteen Diamond Rings v. United States*, 183 U. S., 176. In that case, diamonds were acquired in the Philippines after ratification of the peace treaty with Spain. These

diamonds, upon being brought into the United States without payment of duty, were seized by the federal authorities. This court concluded that the Philippines were, at that time, domestic territories and the tariff sought to be collected applied only to imports. Imports were regarded as being articles brought into the limits of this country from a foreign country.

The same question here presented was presented to the Supreme Court of California in the case of *Dant & Russell, Inc., v. Board of Supervisors*, 133 Pac. (2d), 817. It was there held that the word "imports" referred exclusively to goods shipped from a foreign country and that it has long been settled that the Philippine Islands are not a foreign country. Hence, the articles brought into the State of California did not constitute imports.*

There remains to be considered the question of the effect of the subsequent steps taken by the United States preparatory to granting independence to the Philippine Islands.

The Philippine Commonwealth was established in 1935 under authority of the Independence Statute of 1933, Title 48, U. S. C., Sections 1231 to 1256. Under authority of this act, a constitution was adopted and a commonwealth government set up but independence was not to become effective until July 4, 1946. It has been repeatedly held that a

* In discussing the question here presented, it was said in the case of *Dant & Russell, Inc., v. Board of Supervisors*, 133 Pac. (2d), 817:

"Petitioner contends that the taxes are invalid on the ground that they were imposed on imports in violation of the provisions of Article I, Section 10, of the Constitution of the United States that 'No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports . . .'. The word 'imports', however, as used in this section refers exclusively to goods shipped from a foreign country . . . (citations) . . . and it has long been settled that the Philippine Islands are not a foreign country but an unincorporated territory of the United States. . . . (citations) . . . It follows that the lumber in question does not constitute imports, and it is immaterial whether it can be regarded as having been in original packages unsold at the time the taxes were levied."

conquered territory held by the military authorities continues to be a foreign state or territory until ratification of a peace treaty.

New Orleans v. New York Mail S. S. Co., 20 Wall. 387, 393;

Cross v. Harrison, 16 How., 164;

Doley v. United States, 182 U. S., 222;

Armstrong v. United States, 182 U. S., 243, 244.

By the same reasoning, it may be said that the Philippine Islands continue to be United States territories and possessions at least until their independence becomes complete on July 4, 1946.

In *Cincinnati Soap Company v. United States*, 301 U. S. 308, Justice Sutherland said that the sovereignty of the United States over the Philippine Islands had not been withdrawn by the passage of the Philippine Independence Act and that, so far as the United States is concerned, the Philippine Islands are not yet foreign territory.

* In *Cincinnati Soap Company v. United States*, 301 U. S., 308, 312, Justice Sutherland, speaking for the court, said:

"But it is contended that the passage of the Philippine Independence Act of March 24, 1934, chap. 84, 48 Stat. at L. 456, 48 U. S. C. A., Section 1231, and the adoption and approval of a constitution for the Commonwealth of the Philippine Islands have created a different situation; and that since then, whatever may have been the case before, the United States has been under no duty to make any financial contribution to the islands. Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory."

CONCLUSION.

From the foregoing, it is apparent that title to the fibers constituting the subject matter of this controversy passed to the petitioner after delivery on the specified docks in this country. Hence, the petitioner was not the importer. The imports themselves lost their tax immunity on such passing of title and thereupon became proper subjects of taxation by the state of Ohio.

It is also evident that even if the petitioner had been the importer, it so acted upon the imported goods by using them in its manufacturing business that such goods must be regarded as having become incorporated in the general mass of property within this country and therefore subject to state taxation.

Although the Supreme Court of Ohio found it unnecessary to determine whether the goods brought into Ohio from the Philippine Islands were imports, if it had considered this point, in all probability it would have followed the dissenting opinion and would have reached the conclusion that imports within the meaning of Article I, Section 10, Clause 2, of the Constitution of the United States refer only to articles brought into this country from a foreign country. Since the Philippine Islands are still United States territory, goods brought from such islands into the state of Ohio are not immune from taxation as imports.

It follows that the state of Ohio having had the power to tax the goods in question, the assessments should be sustained.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

THE HOOVEN & ALLISON CO., AN OHIO
CORPORATION,

Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF
OHIO,

Respondent.

PETITION FOR REHEARING.

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Now comes C. Emory Glander, successor to William S. Evatt, as tax commissioner of Ohio, the respondent herein, and presents this his petition for a rehearing of the above-entitled cause and in support thereof respectfully shows:

1. That this case is one of great importance not only to the state of Ohio but to the entire United States as well.

2. That the conclusions of the members of this court were not in accord upon the issue of whether a manufacturer's imported raw material inventory should be immune from local taxation by virtue of the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States.

3. That the majority opinion is founded on the premise that the imported fiber in question was stored in petitioner's warehouse "pending its use in petitioner's manufacturing operations," whereas, the record discloses that said fiber was immediately upon its arrival at petitioner's warehouse applied to petitioner's manufacturing operations in order that petitioner might carry on such operations without interruption. In pointing out that it was necessary for petitioner to have a sufficient quantity of the fiber constantly on hand ready for immediate fabrication, petitioner's witness testified (R., 42):

"No, it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances and we do not carry any more inventory than we need to; it takes three to six months for it to get to us; we attempt to keep a backlog for that; we attempt to run our business with a minimum working inventory, of course."

4. The court's interpretation of the word "use" is limited to the final and ultimate use of the imported fiber, to wit, the consumption thereof in actual fabrication, whereas, the mere presence of such fiber at petitioner's warehouse must be regarded as part of its use, in that such presence was a necessary part of petitioner's manufacturing operations.

5. That this court in the case of **Brown v. Maryland**, 12 Wheat., 419, recognized that imported goods could

be taxed in the hands of the importer if used by him. The breaking of the original package for the purpose of sale, while constituting a use of the imported articles, is but an apt illustration of the principle rather than a principle itself. The majority opinion appears to place greater emphasis upon the breaking of the original package than is warranted by the opinion in *Brown v. Maryland*, supra, in view of the fact that from the time the fibers reached the petitioner's warehouse they were by the petitioner deemed essential to the constant operation of petitioner's factory and to this extent were used in the same manner that an importer of plate would be regarded as using such plate by placing it on the table preparatory to serving a meal.

6. That the majority opinion actually results in the modification of the principle established by *Brown v. Maryland*, supra, and an inequality between taxpayers, in that the immunity of goods imported for sale is lost the instant the goods are used by breaking the original package for purposes of sale, whereas, if imported for manufacturing purposes, the immunity continues even if the goods are used for the purpose of keeping the importer's factory in continuous operation and until the very time the packages are broken and the goods started through the mill. The importing manufacturer is thereby given an advantage not necessary for the purpose of preventing the seaboard states from taxing the inland states, recognized in *Brown v. Maryland*, supra, as the underlying reason for the adoption of Article I, Section 10, Clause 2, of the Constitution of the United States.

4
For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Supreme Court of Ohio be, upon further consideration, affirmed.

Respectfully submitted,

HUGH S. JENKINS,

Attorney General,

AUBREY A. WENDT,

Assistant Attorney General,

Counsel for Respondent.

CERTIFICATE OF COUNSEL.

We, Hugh S. Jenkins and Aubrey A. Wendt, counsel for the above-named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

HUGH S. JENKINS,

Attorney General,

AUBREY A. WENDT,

Assistant Attorney General,

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 38.—OCTOBER TERM, 1944.

The Hooven & Allison Co., Petitioner, vs. William S. Evatt, Tax Commissioner of Ohio.	} On Writ of Certiorari to the Supreme Court of Ohio.
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[April 9, 1945.]

Mr. Chief Justice STONE delivered the opinion of the Court.

Respondent, a tax official of the state of Ohio, has assessed for state ad valorem taxes certain bales of hemp and other fibers belonging to petitioner. The fibers had been brought from the Philippine Islands or from other places outside the United States. When assessed for the tax, they were stored in the original packages in which they had been imported, in petitioner's warehouse at its factory at Xenia, Ohio, preliminary to their use by petitioner in the manufacture of cordage and similar products.

The State Board of Tax Appeals sustained the assessment for the three years in question, 1938, 1939, and 1940. Petitioner then brought the present proceeding in the Supreme Court of Ohio to review the Board's determination. That court rejected petitioner's contention that the fibers are imports, immune from state taxation under Article I, § 10, cl. 2, of the Constitution, which prohibits state taxation of imports or exports; and it sustained the tax. 142 Ohio 235.

The State Court recognized that *Brown v. Maryland*, 12 Wheat. 419, established the rule that imports in their original packages may not be taxed by a state. But it thought that the present case fell within the qualification upon that rule laid down in *Waring v. The Mayor*, 8 Wall. 110. The *Waring* case held that since a purpose of importation is sale, imports are immune from state taxation only so long as they are in the hands of the importer; and lose their immunity upon being sold by him. The Supreme Court of Ohio held that petitioner acquired title to the merchandise here taxed after its arrival in this country. It concluded from this that the foreign sellers or their agents, and not petitioner, were the importers, and that the merchandise, after the sale to petitioner, had

ceased to be an import constitutionally immune from state taxation.

In any case the Ohio court thought that even if petitioner were the importer and the merchandise were immune from taxation on its receipt by petitioner, it nevertheless ceased to be an import, and lost its immunity as such, upon its storage at petitioner's warehouse, awaiting its use in manufacturing. The Court thought that *Brown v. Maryland*, *supra*, laid down a rule applicable only to imports for the purpose of sale, and that imports for use became, upon storage, even if still in the original package, so intermingled with the common mass of property within the state as to be subject to the state power of taxation.¹ The Court found it unnecessary to decide whether the fibers brought from the Philippine Islands, which are not a foreign country, could be imports within the meaning of the constitutional immunity, since they would be taxable in any event upon the two grounds already stated.

We granted certiorari, 321 U. S. 762, because of the novelty and importance of the constitutional questions raised. The questions for decision are (1) whether, with respect to the fibers brought from foreign countries, petitioner was their importer; if so, (2) whether, as stored in petitioner's warehouse, they continued to be imports at the time of the tax assessment; and (3) whether the fibers brought from the Philippine Islands, despite the place of their origin, are likewise imports rendered immune from taxation by the constitutional provision.

The Constitution confers on Congress the power to lay and collect import duties, Art. I, § 8, and provides that "no State shall, without the Consent, of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing it's inspection Laws . . ." Art. I, § 10, Cl. 2. These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in *Brown v. Maryland*, *supra*. We do not understand anyone to challenge that rule in this case.

¹ The Supreme Court of Washington has held, contrary to the decision of the Ohio Court. See *Washington Chocolate Co. v. King County*, — Wash. 2d. —, 152 Pac. 2d 981.

It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framers, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties.² It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, "there must be a point of time when the prohibition ceases, and the power of the state to tax commences." *Brown v. Maryland*, *supra*, 441.

In *Brown v. Maryland*, *supra*, the state sought to impose a license tax on the sale by the importer of goods stored in his warehouse in the original packages in which they were imported. In holding the levy to be a prohibited tax on imports, Chief Justice Marshall said (pp. 441-442):

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

Although one Justice dissented in *Brown v. Maryland*, *supra*, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. *Waring v. The Mayor*, *supra*, 122-123; *Low v. Austin*, 13 Wall. 29, 32-33; *Cook v. Pennsylvania*, 97 U. S. 566, 573; *May v. New Orleans*, 178 U. S. 496, 501, 507-508; *Burke v. Wells*, 208 U. S. 14, 27-22, 24; *Gulf Fisheries Co. v. MacInerney*, 276

² See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

U. S. 124, 126-127; *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414, 423.

All the taxed fibers, with the exception of those brought from the Philippine Islands, which will presently be separately considered, were brought to this country from foreign lands and were undoubtedly imports, clothed as such with a tax immunity which survived their importation, until the happening of some event sufficient to alter their character as imports. As we have said, the Supreme Court of Ohio found such events in what it deemed to be a sale of the merchandise to petitioner after it had been landed in the United States, and in the further circumstance that by storing the merchandise in the warehouse at petitioner's factory, it had become a part of the common mass of property subject to state taxation and so could no longer be regarded as an import.

Resolution of either point in favor of respondent is decisive of the case. Hence we must first consider whether petitioner, rather than the foreign producers or shippers acting through their American agents, was the importer. If so, the tax immunity of the imported merchandise survived its receipt by petitioner and we must determine the further question whether petitioner's subsequent treatment of the merchandise deprived it of its character, and hence its immunity, as an import.

I.

Petitioner's relationship to the merchandise at the time of importation and afterward is of significance only in determining whether, as the state court has found, the relationship was so altered after importation that it can be said that the purpose of the importation had been fulfilled. If it had, there was no longer either occasion or reason for the further survival of the immunity from taxation. That relationship is to be ascertained by reference to all the circumstances attending the importation, particularly as shown by the long-established course of business by which petitioner's supply of fibers has been brought into the country for use in manufacturing its finished product.

The state introduced no evidence, and there is no dispute in point of substance as to petitioner's evidence. The latter consists of the oral testimony of petitioner's general manager, some examples of the contracts by which petitioner procured the merchandise to be brought to this country, and two stipulations containing statements, admitted to be true, which were made by the American agents of the producers and shippers of the merchandise.

Both the Board of Tax Appeals and the state court, without specially finding some of the facts which we regard as of controlling significance, contented themselves with stating the facts generally. They inferred from these facts that petitioner technically was but a purchaser of the merchandise, after it had been imported into this country. They concluded that petitioner was not the importer, and the fibers had ceased to be imports after the sale to petitioner.

In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. *Kansas City Southern Ry. v. Albers Commission Co.*, 223 U. S. 573, 591; *Truax v. Corrigan*, 257 U. S. 312, 325; *First National Bank v. Hartford*, 273 U. S. 548, 552, and cases cited; *Fiske v. Kansas*, 274 U. S. 380, 385-386; *Norris v. Alabama*, 294 U. S. 587, 589-590.

In this case it appears without contradiction that petitioner, in the regular course of its business, contracts for its manufacturing requirements of hemp, jute, sisal and other fibers, before their shipment to this country, and sometimes even before they are produced in the various foreign countries of their origin. Petitioner's negotiations for the purchase are carried on with brokers located in New York City, who represent the foreign producers. After an agreement as to price, petitioner enters into a firm contract to purchase the fibers. A standard form of contract is executed in duplicate or triplicate by petitioner and the broker who signs as agent for or "for account of" his named principal. The contract specifies the kind and amount of fibers purchased, the time of shipment, the American port to which the shipment is to be made, and frequently the steamship company, designated by petitioner, upon whose vessel the merchandise is to be shipped. While the contract gave the seller the option to make deliveries from merchandise warehoused in the United States, no such deliveries were made of any of the merchandise here in question.

The price is a "landed price", which includes as its components the contract cost of the goods at point of origin, the normal charges for ocean freight, marine and war risk insurance and United States

customs clearance (including customs duties in the case of hemp which alone of the purchased merchandise is subject to import duties), and the expense of arranging for transshipment from the port of entry to petitioner at Xenia, Ohio. Any variation from the normal rates for these components (other than the contract cost of the goods, at point of origin) is for account of petitioner. "Extra value" insurance covering any increase in value of the merchandise over the contract price during the voyage, is effected, if petitioner requests, at its expense.

Upon shipment the merchandise is consigned to the broker in this country or to a banker, either on an order or a straight bill of lading, in either case with directions to "Notify The Hooven & Allison Co.?" When the bales of purchased merchandise are loaded for shipment on board vessel at the point of origin, they are given distinctive markings referable to petitioner's contract. A declaration is then cabled to the New York broker referring to the contract upon which the shipment is made, stating the name of the vessel, the approximate number of bales shipped, their identification marks, and the approximate date of arrival in the United States. The broker communicates this information to petitioner and sometimes follows it before arrival of the shipment at the port of entry, with a *pro forma* invoice, which states the approximate tonnage and value of the shipment. Petitioner then gives instructions to the broker, for the shipment from the port to Xenia.

The broker enters the shipment at the custom house in its own name as an accommodation to the petitioner, which has no facilities for clearance of the goods through the customs. The broker then ships the merchandise upon a straight bill of lading to Xenia, where it is delivered by the carrier to petitioner. At that time petitioner pays the freight, and ten to fifteen days after the receipt of the final invoice, it pays the purchase price to the broker. It is stipulated that the sale is upon the unsecured credit of petitioner and it does not appear that there is any retention of a security title either by the foreign seller, the broker, or any intervening banker, to secure payment by petitioner of the purchase price.

From all this it is clear that from the beginning, after the contract of purchase is signed, the foreign producer is obligated to sell the merchandise on credit, to ship it to an American port and to deliver it to petitioner, which is obligated to accept and

pay for it. Performance of the contract calls for, and necessarily results in, importation of the merchandise from its country of origin to the United States. Petitioner's contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation. Examination of the documents and consideration of the course of business can leave no doubt that the petitioner not only causes the importation but that the purpose and necessary consequence of it are to supply petitioner with the raw material for its manufacture of cordage at its factory in Ohio.

From the moment of shipment the taxed merchandise was identified and appropriated to the purchase contract and to that ultimate purpose, by both the seller and the buyer. Petitioner could resell the merchandise while it was in transit. The risk of loss from change in market value was on petitioner, save as it might insure against such loss at its own expense. The right to demand, receive and use the merchandise, subject only to the payment of the contract "landed price", was in petitioner. And obviously if the possibility of the seller's right of stoppage *in transitu*, the carrier's lien or the necessity of payment of customs duties are to be regarded as inconsistent with importation, there would be few importations and few importers in the constitutional sense. For there are few who are not subject to some or all of those contingencies.

Here it is agreed that the sale was on credit. So far as appears in those instances where the merchandise was consigned to a banker, it was for the purpose of financing the producer or shipper, pending receipt of the merchandise and payment for it by petitioner, which appears always to have purchased on credit and to have received the merchandise before payment, and never to have given security for its payment. There was therefore no occasion for an implied reservation of a security "title" as against petitioner in either the sellers or their agents, or the banker in those cases where the goods were consigned on shipment to a banker.

For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here.³ Decision in *Waring v. The Mayor, supra*, upon which

³ Section 1483(1) of 19 U. S. C. provides that merchandise imported into the United States "shall be held to be the property of the person to whom the same is consigned." We do not deem this provision to be significant here, since it is designed merely to identify the person liable for the payment of customs duties, and since, as we have said, the time when title passes to petitioner is immaterial to decision.

the Supreme Court of Ohio relied, did not turn on technical questions of passage of title.⁴ For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. It is common knowledge to lawyers and businessmen that vast quantities of merchandise are annually imported into this country by purchasers resident here, for sale or manufacture here. Sometimes the buyer completes the purchase abroad, in person, and ships to this country; sometimes, as in this case, the purchase is on unsecured credit, but more often it is under contracts by which the vendor reserves in himself or his agent or a banker a lien or title as security for payment of the purchase price on or after arrival. To say that the purchaser is any the less an importer in the one case than in the others, is to ignore the constitutional purpose and substitute form for substance.

As we have said, the constitutional purpose is to protect the exclusive power of the national government to tax imports and to prevent what in matter of substance would amount to the imposition of additional import duties by states, ~~where~~ the property might be found or stored before its sale or use. It is evident that the constitutional prohibition envisages the present transaction, quite as much as if the petitioner had sent his own agent abroad where he had purchased and paid for the merchandise and shipped it to petitioner in this country. The purpose and result

⁴ In the *Waring* case, the purchaser, claiming tax immunity as the importer, purchased the merchandise, after its shipment from abroad, from the American consignee, sometimes before, and sometimes after its arrival in the port of entry. Risk of loss was to be on the seller until the merchandise was entered at the custom house and delivered from the vessel into the purchaser's lighters alongside. The Court thought it immaterial whether the purchase contract was entered into before or after arrival. Since the risk of loss remained on the shipper until the custom house entry and delivery to the purchaser, it held that the shipper or the consignee was the importer; that the purchaser's sale of the goods, which was taxed, was the second sale after importation, and for that reason was not free of tax. In these circumstances it is clear that the purchaser was not the cause of the importation, that the purchaser had no control over or right to demand the merchandise before arrival in port and that the foreign shipper, who bore the risk of loss and retained control of the merchandise and the right to control it until its delivery to petitioner, was the importer.

of the transaction are the same in either case. The apprehended evils of the local taxation of imports after their arrival here are the same.

It is enough for present purposes that the merchandise in this case was imported; and that petitioner was the efficient cause of its importation, the purpose and effect of which was petitioner's acquisition of the merchandise for its manufacture into finished goods. We conclude that petitioner was the importer, and that the merchandise in its hands was entitled to the constitutional tax immunity, surviving delivery of the imports to it.

II.

We turn now to the question whether the immunity was lost by the storage of the merchandise in the original packages, in petitioner's warehouse at its factory, pending its use in petitioner's manufacturing operations. For the purpose of the immunity it has not been thought, nor is there reason for supposing, that it matters whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state. The reason for the original package doctrine, as fully expounded in *Brown v. Maryland*, *supra*, is that unless the immunity survives to some extent the arrival of the merchandise in the United States, the immunity itself would be destroyed. For there is no purpose of taxing importation, itself, even its ultimate suppression, which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer.

On the other hand the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since *Brown v. Maryland*, *supra*, an import is deemed to retain its character as such "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported." *See Brown v. Maryland*, *supra*, 442, for until put to the use for which it was imported. Chief Justice Marshall, in *Brown v. Maryland*, *supra*, pp. 442-443, rejected the suggestion that "an importer may bring in goods, as plate, for his own use and thus retain much valuable property exempt from taxation." Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported they cease to be imports and their tax exemption is at an end. It is quite another matter to say, and Chief

Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, p. 443: "The same observations [i.e., the importer has mixed the goods with the common mass of property, rendering them taxable] apply to plate, or other furniture *used* by the importer." (Italics added.)

We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regulatory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported. *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 521; *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 508-513; *Baldwin v. Seelig*, 294 U. S. 511, 526-527.

This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported; *May v. New Orleans*, *supra*, 501; *Gulf Fisheries Co. v. MacInerney*, *supra*, 126; *McGoldrick v. Gulf Oil Corporation*, *supra*, 423, or when the original packages in which they were imported are broken; *Low v. Austin*, *supra*, 34; *May v. New Orleans*, *supra*, 508-509. But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown v. Maryland*, in which he appeared as counsel for the State, declared, as we now affirm: "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." *License Cases*, 5 How. 504, 575.

In *Brown v. Maryland, supra*, the imported merchandise held in original packages in the importer's warehouse for sale, was deemed tax immune. We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases.

It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question.

It is said that our decision will result in discrimination against domestic and in favor of foreign producers of goods. But such discriminations as there may be, are implicit in the constitutional provision and in its purpose to protect imports from state taxation. It is also suggested that it will be difficult to ascertain in particular cases when an original package is broken, a difficulty which arises, not out of the present decision, but out of the original package rule itself, which we do not understand to be challenged here. Moreover, this supposed difficulty does not seem to have baffled judicial decision in any case in the more than a hundred years which have followed the decision in *Brown v. Maryland, supra*.

As was emphasized in *Brown v. Maryland, supra*, the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter.

In view of the fact that the Constitution gives Congress authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, we see no ~~convincing~~ practical reason for abandoning the test which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture. Unless we are to ignore the constitutional prohibition we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package and before they are devoted to the purpose for which they were imported.

III.

There remains the question whether the fibers which petitioner brought from the Philippine Islands and stored in its warehouse in the original packages are also imports, constitutionally immune from state taxation.

Respondents argue that the Philippine Islands are not a foreign country and that only articles brought here from foreign countries are imports within the meaning of the constitutional provision. Goods transported from one state to another are not imports, since they are articles originating in the United States and not brought into it. *Woodruff v. Parham, supra*; *Songeborn Bros. v. Curdson, supra*; *Baldwin v. Seelig, supra*. It is petitioner's argument that merchandise brought from the Philippines to the United States is an import because it is brought into the United States from a place without, even though not from a foreign country. Implicit in this argument is the contention that the Philippines, while belonging to the United States as a sovereign, are not part of it; and that merchandise brought from the Philippines is an import because it originates outside of and is brought into the territory comprising the several states which are united under and by the Constitution, territory in which the constitutional prohibition against the state taxation of imports, is alone applicable.

The Constitution provides us with no definition of the term "imports" other than such as is implicit in the word itself. Imports were defined by Chief Justice Marshall in *Brown v. Maryland, supra*, 437, as "things imported" and "articles brought into

a country." He added: "If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country."

He thus defined imports by reference not to their foreign origin but to the physical fact that they are articles brought into the country from some place without it. Since most imports originate in foreign countries, courts have not unnaturally fallen into the habit of referring to imports as things brought into this country from a foreign country. *Waring v. The Mayor, supra*; *Woodruff v. Parham, supra*; *Pittsburgh & Southern Coal Co. v. Louisiana*, 156 U. S. 590, 600; *Palapasco Guano Co. v. North Carolina*, 171 U. S. 345, 350; *Máy v. New Orleans, supra*.⁵ But the Constitution says nothing of the foreign origin of imports, and in none of these cases was it necessary to decision to formulate the rule in terms of origin in a foreign country. In each case the result would have been the same if the Court had treated imports merely as articles brought into the country from a point without.

Chief Justice Marshall's definition has received support in cases holding or suggesting that fish caught in the open sea and brought into this country are imports entitled to the constitutional protection, although they did not come from a foreign country. *Gulf Fisheries Co. v. Darrouzet*, 17 F. 2d 374, 376; *Booth Fisheries Corp. v. Case*, 182 Wash. 392, 395. In *Gulf Fisheries Co. v. MacInerney, supra*, we found it unnecessary to decide the point. In that case the fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such and were no longer immune from the challenged state tax. See also *Fishermen's Cooperative Assn. v. State*, 198 Wash. 413. The definition of imports as articles brought into the country finds support also in the circumstance that it has never been seriously doubted that merchandise brought into the United States from without is subject to the power of Congress to impose customs duties, even though the merchandise is not of foreign origin. And the occasion for protecting the power of the national government

⁵ In *Dooley v. United States*, 183 U. S. 151, the Court sustained under the Foraker Act of April 12, 1900, c. 191, 31 Stat. 77, the levy and collection of a tax in Puerto Rico upon goods brought there from New York. The tax was held to be a valid exercise of the power of Congress to enact laws for the government of a dependency acquired by treaty, see *Downes v. Bidwell*, 182 U. S. 244. The Court stated also as an alternative ground, but one unnecessary for decision, that the levy was not a prohibited tax on exports, since Puerto Rico was not a foreign country.

to lay and collect customs duties upon such merchandise, is precisely the same as in the case of that of foreign origin. Hence it is plain that such importations, although not of foreign origin, are within the design and purpose of the constitutional prohibition against the local taxation of imports.

We find it impossible to say that merely because merchandise, brought into the country from a place without, does not come from a foreign country, it is not an import envisaged by the words and purpose of the constitutional prohibition. The interpretation in *Brown v. Maryland*, *supra*, the occasional judicial decisions that foreign origin is not a necessary characteristic of imports so long as they are brought into the country from a place without it, and the purpose of the constitutional prohibition, are alike persuasive that there may be imports in the constitutional sense which do not have a foreign origin.

The fact that the merchandise here in question did not come from a foreign country, if the contention be accepted that the Philippines are not to be regarded as such, is therefore without significance. It is material only whether it came from a place without the "country". Hence, in determining what are imports for constitutional purposes, we must ascertain the territorial limits of the "country" into which they are brought. Obviously, if the Philippines are to be regarded as a part of the United States in this sense, merchandise brought from the Philippines to the United States would not be brought into the United States from a place without, and would not be imports, more than articles transported from one State to another.

The term "United States" may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution.*

When *Brown v. Maryland*, *supra*, was decided, the United States was without dependencies or territories outside its then territorial boundaries on the North American continent, and the Court had before it only the question whether foreign articles brought into

* See Langdell, "The Status of our New Territories", 12 Harv. L. Rev. 365, 371; see also Thayer, "Our New Possessions", 12 Harv. L. Rev. 464; Thayer, "The Insular Tariff Cases in the Supreme Court", 15 Harv. L. Rev. 164; Littlefield, "The Insular Cases", 15 Harv. L. Rev. 169, 281.

the State of Maryland could be subjected to state taxation. It seems plain that Chief Justice Marshall, in his reference to imports as articles brought into the country, could have had reference only to articles brought into a state which is one of the states united by and under the Constitution, and in which alone the constitutional prohibition here involved is applicable.

The relation of the Philippines to the United States, taken as the collective name of the states which are united by and under the Constitution, is in many respects different from the status of those areas which, when the Constitution was adopted, were brought under the control of Congress and which were ultimately organized into states of the United States. See *Balzac v. Porto Rico*, 258 U. S. 298, 304-305, and cases cited. Hence we do not stop to inquire whether articles brought into such territories or brought from such territories into a state, could have been regarded as imports, constitutionally immune from state taxation. We confine the present discussion to the question whether such articles, brought from the Philippines and introduced into the United States, are imports so immune.

We have adverted to the fact that the reasons for protecting from interference, by state taxation, the constitutional power of the national government to collect customs duties, apply equally whether the merchandise brought into the country is of foreign origin or not. The Constitution has not made the foreign origin of articles imported the test of importation, but only their origin in a place over which the Constitution has not extended its commands with respect to imports and their taxation. Hence our question must be decided, not by determining whether the Philippines are a foreign country, as indeed they have been held not to be within the meaning of the general tariff laws of the United States, *Fourteen Diamond Rings v. United States*, 183 U. S. 176; cf. *De Lima v. Bidwell*, 182 U. S. 1; *Dooley v. United States*, 182 U. S. 222, and within the scope of other general laws, *Faber v. United States*, 221 U. S. 649; cf. *Huus v. New York Steamship Co.*, 182 U. S. 392; *Gonzales v. Williams*, 192 U. S. 1; *West India Oil Co. v. Domenech*, 311 U. S. 20, but by determining whether they have been united governmentally with the United States by and under the Constitution.

That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part

of the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima v. Bidwell*, *supra*; *Dooley v. United States*, *supra*, 182 U. S. 222; *Downes v. Bidwell*, 182 U. S. 244; *Dooley v. United States*, 183 U. S. 151; and see also *Public Utility Commissioners v. Ynchausti & Co.*, 251 U. S. 401, 406-407; *Balzac v. Porto Rico*, *supra*. This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by § 3 of Article IV of the Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States". *Dooley v. United States*, *supra*, 183 U. S. at 157; *Dorr v. United States*, 195 U. S. 138, 149; *Balzac v. Porto Rico*, *supra*, 305; *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 323.

In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States. See *Downes v. Bidwell*, *supra*; *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. United States*, *supra*; *Dowdell v. United States*, 221 U. S. 325, 332; *Ocampo v. United States*, 234 U. S. 91, 98; *Public Utilities Commissioners v. Ynchausti & Co.*, *supra*, 406-407; *Balzac v. Porto Rico*, *supra*. And in general the guaranties of the Constitution, save as they are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. See *Balzac v. Porto Rico*, *supra*. The constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States, do not apply to articles brought into or sent out of the Philippines. Despite the restrictions of §§ 8 and 9 of Article I of the Constitution, such articles may be taxed by Congress and without apportionment. *Downes v. Bidwell*, *supra*. It follows that articles brought from the Philippines into the United States are imports in the sense that they are brought from territory, which is not a part of the United States, into the territory of the United States, organized by and under

the Constitution, where alone the import clause of the Constitution is applicable.

The status of the Philippines as territory belonging to the United States, but not constitutionally united with it, has been maintained consistently in all the governmental relations between the Philippines and the United States. Following the conquest of the Philippines, they were governed for a period under the war power. After annexation by the Treaty of Paris of December 10, 1898, military government was succeeded by a form of executive government. By the Spooner Amendment to the Army Appropriation Bill of March 2, 1901, c. 803, 31 Stat. 895, 910, it was provided that "all military, civil, and judicial powers necessary to govern the Philippine Islands shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion. . . . On July 1, 1902 Congress provided for a complete system of civil government by the original Philippine Organic Act, c. 1369, 32 Stat. 691. Step by step Congress has conferred greater powers upon the territorial government, and those of the federal government have been diminished correspondingly, although Congress retains plenary power over the territorial government until such time as the Philippines are made independent. This process culminated in the Act of March 24, 1934, c. 84, 48 Stat. 456, providing for the independence of the islands. The adoption by the Philippines and approval by the United States of a constitution for the Commonwealth of the Philippine Islands, as provided by the Act, have prepared the way for their complete independence.

The Act of 1934 made special provisions for the relations between the two governments pending the final withdrawal of sovereignty of the United States from the Philippines and in particular provided for a limit on the number and amount of articles produced or manufactured in the Philippine Islands that might be "exported" to the United States free of duty. § 6. It provided for the complete withdrawal and surrender of all right of possession, supervision, jurisdiction, control or sovereignty of the United States over the Philippines on the 4th of July following the expiration of ten years from the date of the inauguration of the new government, organized under the Constitution provided

for by the Independence Act,⁷ § 10(a). The new Philippine Constitution was adopted on February 8, 1935, and the new government under it was inaugurated on November 14, 1935. By the provisions of the Independence Act, the United States retained certain powers with respect to our trade relations with the Islands, with respect to their financial operations and currency, and the control of their foreign relations. The power of review by this Court of Philippine cases is continued and extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands. § 7(6). Thus by the organization of the new Philippine government under the constitution of 1935, the Islands have been given, in many aspects, the status of an independent government, which has been reflected in its relations as such with the outside world.⁸

In the meantime, and ever since *The Insular Tax Cases*, *supra*; Congress has often treated as imports, articles brought to the United States from the Philippines. By the Act of August 29, 1916, c. 416, 39 Stat. 548, 48 U. S. C. § 1042, the territorial government of the Philippines was authorized to enact tariff laws. The Sugar Quota Law, 7 U. S. C. § 608a(1), defined as imports the amounts of sugar permitted to be brought into the United States from the Philippines, and prohibited such importation in excess of prescribed quotas. The Act of June 14, 1935, c. 240, 49 Stat. 340, 48 U. S. C. § 1236a, provided for restriction of the amount of hard fibers and its products which could be brought annually from the Philippines to the United States. See also 48 U. S. C. § 1236. And the Independence Act, *supra*, 48 U. S. C. § 1236(a) (b), also regulated the amount of "export tax" which

⁷ Since the war with Japan and that country's temporary occupation of the Philippines, Congress has provided that the date of the independence of the Philippines may be advanced by the President of the United States, upon his proclamation of their liberation and the restoration of the normal functions of government. Act of June 29, 1944, c. 322, Public Law No. 380, 78th Cong., 2d Sess.

⁸ The Philippine Commonwealth participated as a signatory in the following: Agreement and Protocol Regarding Production and Marketing of Sugar of May 6, 1937; Universal Postal Convention of May 23, 1939; Declaration by United Nations of January 1, 1942 (the Philippines signed the Declaration on June 14, 1942); Agreement for United Nations Relief and Rehabilitation Administration of November 9, 1943; United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, of July 1 to 22, 1944; The Protocol Prolonging the International Agreement Regarding the Regulation of Production and Marketing of Sugar of August 31, 1944; The International Civil Aviation Conference of November 1 to December 7, 1944.

might be levied by the Philippines on articles shipped to the United States from the Philippine Islands.⁹

The Independence Act, while it did not render the Philippines foreign territory, *Cincinnati Soap Co. v. United States, supra*, 318-320, treats the Philippines as a foreign country for certain purposes. In 48 U. S. C. § 1238(a)(1), it established immigration quotas for Filipinos coming to the United States, as if the Philippines were a separate country, and in that connection extended to Filipinos the immigration laws relating to the exclusion or expulsion of aliens. It also provided, 48 U. S. C. § 1238(a)(2), that citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For purposes of 8 U. S. C. §§ 154 and 156, relating to deportation, the Philippine Islands are declared to be a foreign country. 48 U. S. C. § 1238(a)(4). Foreign service officers of the United States may be assigned to the Philippines, and are to be considered as stationed in a foreign country. 48 U. S. C. § 1238a. And the Independence Act, § 6, 48 Stat. 456, 460, provides that "when used in this section in a geographical sense, the term 'United States' includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the Island of Guam. As we have said, the Philippines have frequently dealt with other countries, as a sovereignty distinct from the United States.

The United States acquired the Philippines by cession without obligation to admit them to statehood or incorporate them in the Union of states or to make them a part of the United States as distinguished from merely belonging to it. As we have seen, they are not a part of the United States in the sense that they are subject to and enjoy the benefits or protection of the Constitution, as do the states which are united by and under it. In particular, the constitutional provisions governing imports and exports and their taxation, do not extend to articles brought into or out of the Philippines. The several acts of Congress providing for the government of the Philippines have not altered their status in these respects, and Congressional legislation governing trade relations of the United States with the Philippines has not only been consistent with that status, but has often treated articles brought

⁹ This Court has referred to goods brought here from the Philippines as "imports". See *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 320.

from the Philippines to the United States as imports. Our tariff laws in their practical operation have in general placed merchandise brought from the Philippines into the United States in the same relationship to the constitutional taxing power of the national government and the states as articles brought here from foreign countries.

The national concern in protecting national commercial relations, by exempting imports from state taxation, would seem not to be essentially different or less in the case of merchandise brought from the Philippines, which are not included in the territory organized under the Constitution, but for which we have assumed a national responsibility, than in the case of articles originating on the high seas or in foreign countries. As we have said, the reasons for protecting from state taxation articles thus brought into the territorial United States are the same in either case. The advantages and disadvantages, if any, which result from the tax immunity, are inherent in the import clause. But those advantages and disadvantages in the case of the Philippines are no more beyond the reach of Congress than in the case of other imports. Congress is left free by the terms of the import clause to remove the prohibition of state taxation of imports and with it the advantages or disadvantages, whatever they may be, arising from the tax immunity. Congress through the commerce clause, possesses the same power of control of state taxation of all merchandise moving in interstate or foreign commerce. And Congress is free, as in the case of other imports, to regulate the flow of merchandise from the Philippines into the United States by the imposition of either customs duties or internal revenue taxes.

We conclude that practical as well as theoretical considerations and the structure of our constitutional system require us to hold that articles brought from the Philippines into the United States are imports, subject to the constitutional provisions relating to imports both because, as was said in *Brown v. Maryland*, they are brought into the United States, and because the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable.

Reversed.

Mr. Justice REED, dissenting in part.

My disagreement with the Court is confined to that portion of the opinion which determines that the Philippine Islands is not a part of this "country" as that word is defined in the opinion.

The practical effect of the decision is to place the products of those territories and possessions which have not been incorporated into our "country" as integral parts thereof—Puerto Rico, the Philippines, Guam, Canal Zone, and perhaps other territories or possessions—at a considerable advantage over the competing products of states of the continental United States. It enables importers, whether for manufacture or sale, from these possessions to keep on hand, tax free, quantities of non-taxable original packages of imported goods, such as clothing, embroideries, liquors, tobacco, sugars, vegetable oils and fibres. Freedom from taxation has today become an appreciable advantage. Furthermore this freedom from state taxation is gained through an interpretation of Constitutional power and therefore is beyond the reach of equalization by the states alone in all circumstances and by the Congress except by complex tariff legislation which would only reach warehoused imports from dependencies. The Congressional relief to producers of the several states of the Union, therefore, is an awkward approach, which will create irritation with the importing territories by reason of countervailing tariff increases.

These are only practical disadvantages of today's decision which should not override a Constitutional requirement but as it does not seem to me the Constitution clearly calls for this sacrifice of markets by producers in the states, I would not construe the Constitution to put the Philippines entirely beyond the pale of the American economic union. I do not see the necessity for such a ruling and, in fact, I think the Constitution calls for precisely the opposite conclusion for the following reasons:

(1) In the consideration of the taxability by ~~On~~ of shipments from the Philippines which have completed their journey from the Philippines but remain intact in their original packages, the significant Constitutional provision is Article I, Section 10, Clause 2, which reads as follows:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on

Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The Constitution contains no definition of the word "imports" and nothing appears in its history or in the decisions of this Court which indicate that the word was used otherwise in this section than in its normal meaning of a thing brought into the limits of the nation which possesses power over the external commerce which may flow into a state or states which are subject to the prohibition of the quoted Constitutional provision. Normally these imports are from foreign countries and hence there are many references to imports in legislation and decisions which indicate that the source of imports is foreign countries.¹

Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into cession, lands lose their foreign character and become a part of the territories of the victor.² The United States has been content to leave its possessions with a large measure of self-government. To the Philippines it has promised full independence but the time for the fulfillment of that promise has not arrived. Until that date, the United States has responsibilities toward the Philippines and has exercised power unilaterally to make further concessions to the Islands.³ Until complete independence is reached, the citizens of the Philippines owe allegiance to the United States and every Philippine official recognizes this duty. 48 Stat. 456. The interrelation between the United States and the Philippines is for both a basis for amicable relations after complete dissolution of the existing ties.⁴

¹ Products of the sea brought in as imports are a minor variation.

Tariff Act of 1930, 46 Stat. 590, provides that dutiable articles are those imported from any foreign country. The Philippines is not a foreign country under a tariff act which prohibits importation from a foreign country of goods made by convict labor. 28 Op. Atty. Gen. 422. The Philippines is not foreign country under the tariff laws. *De Lima v. Bidwell*, 182 U. S. 1, 197; *Fourteen Diamond Rings v. United States*, 183 U. S. 176; *Dooley v. United States*, 182 U. S. 222, 234; *Dooley v. United States*, 183 U. S. 151; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 520.

² *American Insurance Co. v. Canter*, 1 Pet. 511, 542; *Fleming v. Page*, 9 How. 603, 614; *Dooley v. United States*, 182 U. S. 222, 235.

³ Philippine Independence Act of March 24, 1934, 48 Stat. 456; amending the Philippine Independence Act as to trade and financial relations and rights of Philippine citizens in the United States and all places subject to its jurisdiction, act of August 7, 1939, 53 Stat. 1226; suspending the export tax on Philippine products, act of December 22, 1941, 55 Stat. 852; Filipino Rehabilitation Commission act of June 29, 1944, 58 Stat. —.

⁴ Address of President Sergio Osmena on the occasion of the Reestablishment of the Commonwealth Government in Manila, February 27, 1945.

(2) This Court, however, determines that an import under Article I, Section 10, Clause 2, is a commodity brought into this "country" and that the Philippines is not a part of this "country" within the meaning which the Court attributes to that word. The Court is of the view that this "country" includes only those sections of the lands under our jurisdiction which have been so incorporated into our system by act of Congress as to be entitled to government under all provisions of the Constitution rather than by Clause 2, Section 3, Article IV, regarding "Territory . . . belonging to the United States." *Downes v. Bidwell*, 182 U. S. 244. As a basis for this distinction, the Court depends upon a statement in *Brown v. Maryland*, 12 Wheat. at 437, that a "duty on imports, is a custom or tax levied on articles brought into a country." The Court must make this argument to support its position as of course the Philippines is not a foreign country. *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 319.

There are a number of reasons why I think that this reliance on this language of *Brown v. Maryland* leaves the opinion without support in its conclusion that shipments from the Philippines are imports. In the first place, in *Brown v. Maryland*, there was no occasion to distinguish between articles brought into the country and articles brought from foreign places. The words used are descriptive of commerce from foreign lands. Secondly, *Woodruff v. Parham*, 8 Wall. 123, interprets the meaning of "brought into the country" as used in *Brown v. Maryland* as follows, pp. 181-32:

"In the case of *Brown v. Maryland*, the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown v. Maryland* was decided—namely, in 1827—it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country, the Chief Justice used the word country as a synonyme for United States."

See also *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 520.

Thirdly, the writer of the opinion in *Brown v. Maryland* referred, p. 439, to the purpose of the prohibition against state taxation of imports as a thing desirable "to preserve . . . our commercial

connexions with foreign nations." The dissent referred repeatedly to foreign merchandise as did counsel in their argument. Fourthly, the suggestion that the Court's view is supported by the decisions that sea products are imports seems to me unfounded. Deep sea products come from waters beyond the national sovereignty or jurisdiction and hence are imports under any definition. American fisheries even may require, unless American bottoms are American territory, legislation to relieve their catch of general tariff charges. *Proctor & Gamble Manufacturing Co. v. United States*, 19 U. S. C. C. P. A. 415. The required conclusion, it seems to me, is that an import is an article brought from beyond the sovereignty or jurisdiction of the United States. *De Lima v. Balwell*, 182 U. S. 1, 180.

(3) Land within the jurisdiction of the United States cannot export to the United States under Section 10, Article I, any more than one State can export to or import from another state. 192 U. S. at 520. When the *Insular Cases* determined that articles from the lands Spain ceded to us were subject to tariff duties at the will of Congress, the decisions were based on the power of Congress to impose duties unequally, i. e., without uniformity, despite Article I, Section 8, Clause 1, of the Constitution, on commodities from lands under our flag because these lands had not been incorporated by act of Congress into the Union as an integral part of the United States. *Dornes v. Bidwell*, 182 U. S. 244, 298, *et seq.*; *Dorr v. United States*, 195 U. S. 138, 149; *Balzac v. Porto Rico*, 258 U. S. 298, 305. The question as to the meaning of imports or imported was not discussed. Whether or not the articles were imports, so long as the lands of their origin were not an integral part of the United States, the Congress could put such duties as it chose on the products. It does not follow that because the Philippines is not an integral part of the United States its shipments are imports under Article I, Section 10, unless the view of the Court's opinion of today is adopted that an import is an article brought into the United States as that country is defined in the Court's opinion. The argument advanced by the Court to sustain its declaration that the articles brought from the Philippines are imports would

* Article I, Section 8, Clause 1: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

have made shipments from the Louisiana Purchase, *Downes v. Bidwell*, 182 U. S. 244, 322-33; Florida, *id.* pp. 333-34, and Hawaii, *Hawaii v. Mankichi*, 190 U. S. 197, 219, also imports until these territories were incorporated into the United States. History refutes such a position.

We are thus left to define the word import as used in Section 10, Article I, in its normal sense to accomplish the purpose of the section. It may have had several purposes. *Brown v. Maryland*, *supra*, at p. 439. Whether it was to grant the union a source of revenue, to preserve harmony among its members or to avoid state tariffs which would affect relations with foreign governments, the purpose is not advanced by molding Philippine shipments into imports in the Constitutional sense. Revenue may be exacted by the federal government from Philippine products brought into the states and a state cannot collect a duty from such articles if they are not imports. *Downes v. Bidwell*, 182 U. S. 244; *Woodruff v. Parham*, 8 Wall. 123, 133; *Coe v. Errol*, 116 U. S. 517, 526. No light can come from the history of the adoption of the section. The idea of an American possession was not in being. But since the Founding Fathers were creating a commercial as well as a political entity, it seems more consonant with their purpose to define imports under the section as things brought into the territory under the jurisdiction or sovereignty of the American government.

(4) Such a conclusion probably meant little to the Philippines. Congress has provided for their early independence. But the principle established by this decision will persist for the other lands which became American by the Treaty of Paris. The Court's opinion disclaims determination of any rights beyond the Philippines but the basis upon which the decision rests supports similar rights for all lands covered by the Treaty of Paris. Similar articles covered all the ceded lands.⁶ Puerto Rico is in the same status as the Philippines. *Balzac v. Porto Rico*, 258 U. S. 298, 305. Today's decision thus assumes a continuing importance which justifies setting out my reasons for dissenting.

⁶ Treaty of Paris, December 10, 1898, 30 Stat. 1754:

"Article II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladroneas.

"Article III. Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following lines:"

Mr. Justice BLACK, dissenting.

In *Brown v. Maryland*, 12 Wheat. 419, 422, Marshall, C. J., pointedly rejected the argument that the rule announced in that case would permit an importer "to bring in goods . . . for his own use, and thus retain much valuable property exempt from taxation."¹ Today, this Court, in holding that an Ohio manufacturer may escape payment of a non-discriminatory state *ad valorem* tax on goods imported from abroad and held for use in its factory, interprets Marshall's opinion in a manner which squarely conflicts with his own interpretation of the rule he announced.

It has, from the very beginning, been recognized that " . . . there must be a point of time when the prohibition [to tax] ceases, and the power of the state to tax commences;" although the task of drawing this line is so difficult that no general rule "universal in its application" can be stated, yet that line nevertheless " . . . exists, and must be marked as the cases arise." *Brown v. Maryland*, *supra*, 441. The Court did there draw an arbitrary line of demarcation marking the boundary of a state's power to tax property "imported for sale." It held that, as to property imported for sale, "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." *Brown v. Maryland*, *supra*, at 442. The right to sell, it was there said, was an element of the right to import, and thus a state tax imposed before, or as a condition upon, the sale, would substantially impair the right of sale granted by the government to importers. The Court reinforced its conclusion by referring to its belief that a state tax on the importer would increase the cost to the ultimate domestic purchasers, and that the effect of this would be to enable the great seaport states indirectly to levy tribute upon consumers of imported articles living in the non-

¹ Counsel for Maryland had argued that to permit state tax immunity in that case would result in granting immunity to "an importer who may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." In reply to this argument, Marshall rejected the assumption that the principles then announced would grant state tax exemptions to imports that had reached their ultimate destination and were being used or held for use by the importer. "The tax," he said, "finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege [i. e., of sale] he has purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer." p. 443.

seaport states, a practice which the constitutional clause here invoked was intended to prevent.²

While the rule announced in *Brown v. Maryland* has at times been severely criticized, see e.g. *License Cases*, 5 How. 504, opinion of Mr. Justice Daniel, 615-617, and has in some cases been narrowly restricted in its application,³ it has been, and still is, the general rule of decision in this Court, as regards imports for sale from foreign countries. But neither the rule nor the reasoning in *Brown v. Maryland*, nor any of the cases which followed it, support the Court's holding that one who imports an article for his own use or consumption can enjoy the full benefits of ownership, and simultaneously claim an immunity from state taxation on the ground that it is still an import. The Court, in *Brown v. Maryland*, was in reality treating goods in the hands of an importer for sale, as though they were still in transit until the first sale had been made. This was in accord with the interpretation of the rule by Chief Justice Taney in the *License Cases*, *supra*, 575. He there said that while imported articles "are in the hands of the importer for sale . . . they may be regarded as merely *in transitu*, and on their way to the distant cities, villages and countries for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported."

But the fibers here were not *in transitu* in any possible sense of the phrase. Every conceivable relationship they had, once borne to the process of importation had ended. They were at rest in the petitioner's factory along with its other raw materials, having arrived at the point where they were "to be used and consumed" in current production, and kept as a "backlog" to assure constant operation of the plant.

*Brown v. Maryland*² and the cases which followed it stand for the rule that one who pays import duties on goods intended for sale thereby purchases the right to sell the goods, free from state taxation so long as the goods are held in the original package. Until today, none of this Court's decisions have ever held or even intimated that one who imports goods for his own use purchases

² To the same effect, see *Woodruff v. Parham*, 8 Wall. 123, 127-136.

³ See e.g. *May v. New Orleans*, 178 U. S. 496; *Burke v. Wells*, 208 U. S. 14; *Sonneborn Bros. v. Cureton*, 262 U. S. 506; *Gulf Fisheries Co. v. MacInerney*, 276 U. S. 124; *Baldwin v. Seelig*, 294 U. S. 511, 526. See also *Petroleum Corporation v. South Portland*, 121 Maine 128, 26 A. L. R. 965, 971-980; *Tres Ritos Ranch Co. v. Abbott*, 44 N. Mex. 556.

from the federal government, by payment of import duties, a right to hold them free from liability for state taxes, after they have reached the end of their import journey and are being held for use in the importer's factory. Neither the "purchase-of-a-right-to-sell" argument nor any of the other reasons deemed relevant to support the "import-for-sale-original-package" doctrine call for its extension to goods imported for use.

It is clear under the doctrine of *Brown v. Maryland*, that after sale by an importer, imported goods are subject to state taxation. The opinion of the Court today, holding that goods held for use are immune from state taxation, results in this rather odd situation: One who imports goods himself and holds them for his own use in his factory is not liable to state taxes on such goods; but if he bought the goods from one engaged in the business of importing, he would be liable to taxation on the same goods. The artificiality of this tax distinction suggests grave reasons to question the soundness of the Court's interpretation of the rule. Furthermore, implicit in Marshall's opinion is a recognition of the importance of protecting goods imported for sale from discrimination in the form of taxes. The net effect of today's opinion is to accomplish just such discrimination, in favor of goods imported for use, and against goods imported for sale.

Again, state taxation of previously imported goods held for use in manufacturing does not afford the great seaport states an opportunity to tax imports to the detriment of other states. This was one of the apprehended evils which the "import for sale" rule in *Brown v. Maryland* was fashioned to prevent. The most fertile imagination would be hard put to prove that it would injure or threaten any other state for Ohio to collect its non-discriminatory ad valorem tax on fibers held for use in that state. Certainly the Court advances no persuasive argument in this respect. On the contrary, it does appear that Ohio, as well as other states, will be injured by a constitutional interpretation which denies Ohio the right to collect the tax. Ohio is injured by the Court's new rule because it cannot apportion its tax fairly upon all who carry on business under the protection of Ohio's laws.

The rule announced by the Court also discriminates against other states. Their products held for use are subject to state taxation. Products from abroad are not. Wines offer an illustration. Wines, stocked in one's private cellar, produced from

California or New York grapes, are held for future use in the original package or otherwise, are subject to state taxation. Today's rule renders a state wholly powerless to tax wines imported from abroad and held for future use side by side with taxable wines made in the United States. Thus, through constitutional interpretation, all foreign products are granted a tax subsidy at the expense of the individual states affected. If I thought the Constitution required such tax discriminations against American products, I should agree to the Court's opinion. The whole history of events leading up to the Constitution, and this Court's opinions in construing it, persuade me that no such consequence was ever contemplated by those who wrote or approved our Constitution.

A final word as to today's new constitutional doctrine. Precisely how it is to be applied the Court does not tell us. From one part of the Court's opinion it appears that the state can never tax these fibers at all, since it seems to be said the state can never tax until they "are subjected to the manufacture for which they were imported." Another part of the opinion indicates they can be taxed when the original package is broken. Previous opinions of this Court have indicated the difficulties and defects of an original package doctrine.⁴ Are these fibers to be taxed when the "reed" which covers them is removed, or must the state wait until it can prove one of the steel bands has been broken? Other questions suggest themselves in regard to wine imported for use and stored in one's private cellar for individual consumption. When, if at all, can a state tax it? Is it when the wine reaches the cellar or must the state withhold its taxing hand until the wine is "subjected to the [consumption] for which it was imported"? Or can the state tax each crate when the owner, or someone for him, removes the crate's top with a crowbar? If the wine is imported in large casks, does it become taxable when the stopper is removed from the bung hole or only when a part or all of it has been consumed? The states are entitled to have a definite answer to these practical questions.

Mr. Justice DOUGLAS, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE join in this opinion. Mr. Justice DOUGLAS is of the view that, accepting the Court's ruling that these products are "imports," the rule should be applied without discrimination against the Philippines.

⁴ Note 3; *supra*.

Mr. Justice MURPHY, concurring in part.

With Mr. Justice BLACK's view, that whatever constitutional tax immunity the merchandise in question may have had, was lost by virtue of its storage in petitioner's warehouse pending its use in petitioner's manufacturing operations I agree. But the Court holds otherwise on that issue. We therefore are met with the further issue as to whether the fact that the merchandise was shipped from the Philippine Islands to the United States made the merchandise an import within the meaning of Article I, Section 10, Clause 2 of the Constitution and therefore immune from state taxation. As to that problem I am convinced that the affirmative answer given by the CHIEF JUSTICE is the correct one and I concur in that portion of his opinion.

That affirmative answer, in my estimation, is compelled in good measure by practical considerations. The moral and legal obligations owed the Philippine Islands by the United States are, so far as I am aware, matchless and unique. The United States is committed to a policy of granting complete independence to the Philippines. It has already granted their people and their officials a large measure of autonomy. But until the sovereignty of the United States is finally withdrawn, the United States retains plenary and unrestricted powers over them and is responsible for their welfare.

We have as a nation exhibited an ideal and a selfless concern for the well-being of the Philippine people, a concern that has been deepened by the devastation that war has brought to their land. Since the Islands were ceded to us, we have at once fostered their economic development through preferential trade agreements and encouraged their desires for freedom and independence. Their industries and their agriculture have gradually been adjusted in contemplation of their eventual sovereign independence. But war has stricken their land and their peoples. Their growing economy has been largely decimated by over three years of ruthless invasion and occupation. Filipinos in countless numbers have yielded up not only their property but their lives and their liberties. Their economic and social structure has fallen about them in ruins.

Now, with the Islands liberated, our moral and legal obligations are greater than ever before. Our responsibility for providing urgent relief and rehabilitation has been readily assumed. But

the more complex and difficult duty of helping to reconstruct the Philippine economic structure remains to be fulfilled. It is clear that the Philippines cannot safely be thrown into the world market and left to shift for themselves. For the foreseeable future, at least, their economy must be closely linked to that of the United States, without either country abandoning or retreating from the common ideal of independence for the Philippines.

Accordingly it is my view that if it is reasonably possible to do so we should avoid a construction of the term "imports," as used in Article I, Section 10, Clause 2 of the Constitution, that would place Philippine products at a disadvantage on the American market to the advantage of products from other countries or that might be a means of impeding the economic rehabilitation of the Philippines. If we can justifiably construe that term to prohibit state taxation on shipments from the Philippines we shall to that extent have conformed to the national policy of aiding the Philippine reconstruction. Any taxation or tariff on Philippine shipments that may be felt to be necessary from the standpoint of the United States would then become a matter solely for Congress, which could properly balance any conflicting interests of the two nations.

Such a construction, in my estimation, is entirely fair and reasonable. There are, to be sure, statements by this Court to the effect that the term "imports" refers only to those goods brought in from a country foreign to the United States. *Woodruff v. Parham*, 8 Wall. 123, 136; *Dooley v. United States*, 183 U. S. 151, 154. But such statements, as pointed out by the Court today, were unnecessary to the decision of the issues there involved and cannot control the problem presented here. It has also been held that the Philippine Islands are not a foreign country within the meaning of tariff laws specifically referring to any foreign country. *Fourteen Diamond Rings v. United States*, 183 U. S. 176; *De Lima v. Bidwell*, 182 U. S. 1. The inapplicability of these cases is obvious.

It further appears that Congress has usually avoided the use of the term "imports" in the enactment of legislation affecting trade with the Philippines and other dependencies and that the term has been regarded by certain government agencies as inapplicable to articles coming from the Philippines. But such usage clearly cannot affect our interpretation of a constitutional provision.

As appears more fully in the Court's opinion, there is thus no controlling authority requiring us to hold that shipments from the Philippines are not imports within the meaning of Article I, Section 10, Clause 2 of the Constitution. Under such circumstances the interpretation of this constitutional provision adopted by the CHIEF JUSTICE is a permissible one. And, in view of what I conceive to be the practical considerations, it is a highly necessary and desirable one. Only under that interpretation can this part of the Constitution be consistent with our duties as trustee for the Philippines.

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